Supreme Court, U.S.
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No. ____

In the Supreme Court of the United States

October Term, 2000

BOISE CASCADE CORPORATION, a Delaware corporation,

Petitioner,

v.

STATE OF OREGON,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE OREGON COURT OF APPEALS

APPENDIX TO PETITION FOR WRIT OF CERTIORARI VOLUME II

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January 25, 2001

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TABLE OF APPENDICES

Appendix	Document
A	*Boise Cascade Corp. v. State ex rel. Oregon State Board of Forestry*, 991 P.2d 563 (Or. App. 1999).
B	Order of Oregon Court of Appeals dated March 15, 2000, in *Boise Cascade Corp. v. Board of Forestry* (CA A100855), denying reconsideration of its prior decision reported at 991 P.2d 563.
C	Order of the Oregon Supreme Court dated October 24, 2000, in *Boise Cascade Corp. v. Board of Forestry*, ___ P.2d ___ (SC S47459), denying petition for review.
D	Letter Opinion dated October 16, 1997, of the Clatsop County Circuit Court (No. 93-2018) denying Petitioner summary judgment on its possessory takings claim, and granting summary judgment on the issue of liability on Petitioner's regulatory takings claim.
E	Jury Verdict dated November 21, 1997, in *Boise Cascade Corp. v. Board of Forestry* (Clatsop County Circuit Court No. 93-2018), finding the State liable on Petitioner's *Loretto* claim and making findings on the compensation issues.
F	Judgment of the Clatsop County Circuit Court in *Boise Cascade Corp. v. Board of Forestry*, No. 93-2018, entered on April 30, 1993.
G	*Boise Cascade Corp. v. Board of Forestry*, 886 P.2d 1033 (Or. App. 1994).

H — *Boise Cascade Corp. v. Board of Forestry*, 935 P.2d 411 (Or. 1997).

I — Appellate Judgment in *Boise Cascade Corp. v. Board of Forestry*, (CA A78968, A79458, SC S47459), entered on December 15, 2000.

J — Oregon Administrative Rule 629-665-0210 (2000), formerly numbered 629-024-0809.

K — Oregon Administrative Rule 629-680-000 (2000), formerly numbered 629-056-0010.

L — Oregon Administrative Rule 629-680-0010(5) (2000), formerly numbered 629-056-0020(5).

M — Oregon Administrative Rule 629-680-0100(1) (2000), formerly numbered 629-056-0100(1).

N — Oregon Administrative Rule 629-680-0220 (2000), formerly numbered 629-056-0220.

O — USF&WS *Procedures Leading to Endangered Species Act Compliance for the Northern Spotted Owl* ("Guidelines"), dated July 1990.

P — USF&WS Memorandum issued October 2, 1991, rescinding Guidelines.

Q — Memorandum Order of the U.S. District Court for the District of Columbia dated February 27, 1992, regarding USF&WS's recission of the Guidelines.

R — Final Order of Bureau of Forestry ("BOF") dated January 19, 1993, affirming the State Forester's denial of Boise Cascade's amended plan for timber harvest.

S — Letter dated October 15, 1997, from the Oregon Department of Forestry to counsel for Boise Cascade.

T — Judgment entered by Clatsop County Circuit Court on December 24, 1997, in favor of Boise Cascade in the amount of $1,820,059, plus prejudgment interest.

U — Letter from the BOF's counsel to the USF&WS dated June 16, 1992, and cited in the BOF's Final Order (App. R) as indicating that Oregon law would not be satisfied if the USF&WS were to issue a decision finding that an Incidental Take Permit ("ITP") under the Endangered Species Act was not required.

V — Order of Oregon Court of Appeals in *Boise Cascade Corp. v. Board of Forestry* (CA A100855) dated January 6, 2000, granting in part Boise Cascade's Motion for Reconsideration.

W — Injunction Order dated July 28, 1997, in *United States v. Coast Forest Res. Ltd. P'ship*, U.S.D.C. Or. Civil No. 96-1575-HO, 2000 WL 298707 enjoining another timber owner because there was a spotted owl activity center approximately one mile away from the harvest site.

X — Complaint filed in *State of Oregon v. Int'l Paper Co.*, U.S.D.C. Or. Civil No. 93-6223-HO, dated July 1993.

Y — Letter dated December 10, 1997, from the federal government to counsel for Boise Cascade suggesting that Petitioner should apply for an ITP.

Z	Decree and Judgment entered on October 15, 1998, by the United States District Court for the District of Oregon in *Boise Cascade Corporation v. Michael J. Spear*, No. 97-1810-JO, granting the federal government an injunction prohibiting Petitioner from cutting any trees on its property unless it first obtained an ITP.
AA	Letter from the federal government's counsel to Boise Cascade dated July 30, 1999, concluding that the site had been abandoned by the owls, and notifying Boise Cascade that the government would not oppose dissolving the existing injunction.

PROCEDURES LEADING TO ENDANGERED SPECIES ACT COMPLIANCE FOR THE NORTHERN SPOTTED OWL

Including:

- o Formal Section 7 Consultation Guidance
- o Interim Recovery Strategy
- o Conservation Planning for Non-Federal Actions
- o Guidance for Incidental Take

U.S. Fish and Wildlife Service
Region 1
July 1990

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OWL PROCEDURES MANUAL

INTRODUCTION

With a listing decision now made for the northern spotted owl and an effective date of July 23, 1990, many people are wondering exactly what changes may occur to timber harvest programs in order to adequately protect the owl. In this document, the U.S. Fish and Wildlife Service (Service) describes its consultation, recovery, law enforcement (taking) guidelines, and conservation planning processes in an attempt to lay out procedures that are consistent with provisions of the Endangered Species Act (ESA), applicable on the effective date for listing of the northern spotted owl. With the cooperation of the other Federal agencies, as well as State and private entities, these guidelines outline the most efficient way of doing business under the ESA, at least for the first year after a listing, and would help meet the goals of other applicable laws and regulations.

PURPOSES

1. To provide clear examples of how ESA processes may work for the spotted owl.

2. To provide clarification of the Service's view of the Interagency Scientific Committee's (ISC) conservation strategy.

3. To put ESA spotted owl guidance in an understandable, manual-type format for distribution to Federal and non-Federal sectors as a working document.

BACKGROUND

- SECTION 7 OF THE ESA -- FORMAL CONSULTATION FOR FEDERAL ACTIONS

Federal agencies that fund, authorize, or carry out actions which "may affect" listed species must consult with the Service under Section 7. Federal actions that are nondiscretionary or that have "no adverse effects" on listed species are not subject to formal consultation. For timber harvest activities, the "may affect" standard applies to harvest activities within a ½ mile radius of any known nest site or pair activity center. The Service believes that these actions represent a threshold standard for timber activities requiring formal Section 7 consultation.

Formal consultation always results in a biological opinion issued from the service to the action agency. The opinion always makes a likely to jeopardize" or "not likely to jeopardize" finding for the action subject to formal consultation. The finding takes into account the environmental baseline condition of the listed species, plus the direct, indirect, interrelated, and interdependent effects attributable to the Federal action at hand, together with the cumulative effects of State and private actions reasonably certain to occur in the area of the Federal action.

Biological opinions may contain suggestions for project/action modifications, ranging from reasonable and prudent alternatives (only in a "jeopardy opinion") to reasonable and prudent measures/terms and conditions (mandatory elements of an incidental take statement) to conservation recommendations (suggestions which are left to the discretion of the action agency to implement).

Standards for the determination of incidental take are of particular significance to any future biological opinions for the northern spotted owl. Incidental take of listed species is "take" (as defined by the Endangered Species Act) that occurs incidentally to otherwise lawful activities. An obvious example of incidental take would be unknowingly cutting a tree which contained an owl nest with eggs or young.

The Service believes that incidental take also occurs for timber harvest activities which may harm or harass northern spotted owls. In order to define such activities which result in the most subtle type of incidental take, the Service convened a group of its biologists and developed incidental take guidelines which consider the biology of the owl throughout its range. Such guidelines are described later in this document.

o SECTION 9 AND 10 OF THE ESA -- TAKE FOR NON-FEDERAL ACTIONS

Take of endangered or threatened species is prohibited under Section 9 of the Endangered Species Act. The 1982 Amendments to the ESA gave the Service a procedure to authorize the incidental take of listed species by non-Federal parties in much the same way a Section 7 consultation (Incidental Take Statement) can authorize incidental take for Federal actions. Private parties whose otherwise lawful actions will result in incidental take of a listed species can apply for a permit authorizing such take by submitting a permit application and a Habitat Conservation Plan (HCP) to the Service.

Conservation Planning is a term that generally refers to the Section 10(a)(1)(B) permit process. This manual will go through the general procedures necessary for a private party to submit a properly prepared permit application for processing.

o SECTION 4 OF THE ESA -- RECOVERY STRATEGY

The Service will ultimately have an approved recovery plan for every listed species, as set forth in Section 4 of the ESA. Right now, there are approved recovery plans for less than one-half of all listed species. Recovery plans set forth goals which, once achieved, can result in delisting the subject species.

An approved recovery plan is not necessary to carry out formal consultation under Section 7, to consider permit applications under Section 10, nor to enforce the prohibitions of "take" under Section 9. Nevertheless, recovery plans are useful planning tools and may help guide and coordinate all conservation gained through Section 7 and Section 10, and focus such conservation actions on recovery and delisting. This manual will focus on the existing knowledge available, especially the ISC report, and make suggestions as to how the agencies can utilize such information as a potential recovery strategy.

DISCUSSION AND EXAMPLES

o FORMAL CONSULTATION UNDER SECTION 7

It is the responsibility of the action agency (e.g., Forest Service and Bureau of Land Management) to determine which actions "may affect" threatened or endangered species, and to initiate consultation with the Service. As noted above, "may affect" situations for the owl are defined as those activities that involve harvest or related activities within spotted owl habitat, and/or harvest activities which may pose disturbances to nesting pairs within ½ mile of any known nest site or pair activity center, regardless of the suitability of the habitat.

Suitable habitat selected by northern spotted owls was described in the (ISC) conservation strategy as typically exhibiting ". . . moderate to high canopy closure; a multilayered, multispecies canopy dominated by large overstory trees; a high incidence of large trees with large cavities, broken tops, and other indications of decadence; numerous large snags; heavy accumulations of logs and other woody debris on the forest floor; and considerable open space within and beneath the canopy. These attributes are usually found in old growth, but they are sometimes found in younger forests, especially those that contain remnant large trees or patches of large trees from earlier stands. In younger forests

that support breeding owls, the nest and major roost sites are usually found where large trees from the earlier, older stands remain." It is important to note that the age of forests is not as important a factor in determining habitat suitability as are vegetational and structural components. Areas where consideration of spotted owl habitat may be especially important in consultation are: 1) habitat that is currently occupied by owls, 2) Habitat Conservation Area as defined in the ISC conservation strategy, and 3) areas of special concern as defined in the Service's 1989 Status Review Supplement.

Once the action agency has made the "may affect" determination, a written request should be made to the Service for formal consultation. This request should be accompanied by an assessment of the action and its impacts, and contain the following general categories of information (a more detailed outline for a biological assessment is provided in Appendix 1):

1. a description of the action to be considered;
2. a description of the specific area that may be affected by the action;
3. a description of any listed species or critical habitat that may be affected by the action;
4. a description of the manner in which the action may affect any listed species or critical habitat and an analysis of any cumulative effects;
5. relevant reports, including any environmental impact statement or environmental assessment; and
6. any other relevant available information on the action, the affected listed species, or critical habitat.

After review of this information, the Service then prepares a biological opinion which includes:

1. an analysis of the direct and indirect effects, as well as the effects of interrelated and interdependent activities, and cumulative effects of reasonably certain State or private activities in the action area;
2. a biological opinion on whether the action is "likely to jeopardize" or "not likely to jeopardize" the continued existence of the species (reasonable and prudent alternatives will generally be provided if the opinion indicates that the proposed action is likely to jeopardize the continued existence of the species);
3. an incidental take statement which will identify the anticipated level of incidental take that will occur, and provide reasonable and prudent measures and terms and conditions for minimizing incidental take; and
4. conservation recommendations that, if implemented, would minimize impacts and promote the conservation of the species.

Reasonable and prudent measures and terms and conditions to minimize incidental take are mandatory, as are reasonable and prudent alternatives in a jeopardy opinion, and should be carried out by the action agency. Implementation of conservation recommendations, although strongly encouraged by the Service, is at the discretion of the action agency. A general outline for biological opinions is shown in Appendix 2.

The Forest Service and Bureau of Land Management (BLM) are considering dividing their sales into 3 categories for purposes of formal consultation:

1. all sold sales sold prior to FY-89;

2. planned and sold sales for FY-89 and 90 (Section 318 sales, and sales previously in conference); and
3. FY-91 planned sales.

Each Federal action "package" will result in a separate biological opinion issued by the Service to the Forest Service and the BLM (assuming both action agencies utilize similar consultation "packaging"). The Service is committed to issuing biological opinions on categories 1 and 2 within 30 days of receipt of the additional information necessary to complete the administrative record (and as close as possible to any effective date of a listing).

In each biological opinion the Service would provide conservation recommendations and an Incidental Take Statement (where appropriate) based on the Interagency Cooperation Regulations found at 50 CFR Part 402. To display possible results from such opinions, and assuming the occurrence of incidental take, we have prepared a list of examples of reasonable and prudent measures that would minimize or avoid incidental take, and listed conservation recommendations that are applicable to incidental take (see Table 1). We have further divided the list into two parts. Measures and recommendations that are (1) based upon the ISC Conservation Strategy or (2) based upon current management plans. Departure from these "example" reasonable and prudent measures and conservation recommendations may be advised, if through coordination with the Service, it is determined that sound biological data and reasoning indicate that the species would benefit from such a departure.

Appendices 3A and 3B provide examples of possible conservation recommendations, applicable under Section 7(a)(1), that may further promote the conservation of the species. Similarly, the first list (Appendix 3A) is based upon the ISC Conservation Strategy, while the second (Appendix 3B) is based

upon current management direction. These recommendations are not mandatory and are intended to provide an opportunity for the agency to further the conservation of the owl.

Comparisons between timber harvest actions "with ISC Strategy" and "without" were made at the request of the Department of the Interior. At the time of this writing, there are no other conservation strategies developed and presented for similar comparisons. If appropriate, future versions of this manual may analyze the likely conservation actions that would be called for under Section 7 if other, yet unknown, strategies were considered.

In the meantime, the ISC Conservation Strategy represents the most current management advice, developed through a multiagency working group that included the most knowledgeable owl experts. The strategy provides a long-term approach to owl management, consisting of major elements, that in combination comprise an integrated approach to conservation of the species. Deviations from the strategy in the short-term increase risk to its long-term success. Thus, the strategy provides a conservation goal against which all future actions will need to be measured. Since the strategy acknowledges the loss of habitat in conservation areas only through the 1990 sale program, it may be necessary to prepare a new or updated conservation strategy if the ISC's recommendations are not implemented in full prior to contracting 1991 sales.

Table 1. Examples of Reasonable and Prudent Measures Under Conservation in Incidental Take Statements for Federal Actions as Well as Applicable Conservation Recommendations

Reasonable and Prudent Measures and Conservation Recommendations Related to Incidental Take			
Sales Type	Limitations on Reasonable and Prudent Measures and Conservation Recommendations	Basis: Current Agency Management Plan Scenario	Basis: Agency Implementation of Interagency Scientific Committee Report

Sold Sales (pre-89 and FY-89/90 sold sales including sales under Section 318)	Sales are under contract, expense is high to modify contract.	Reasonable and Prudent Measures: Implement restrictions during the nesting season to protect pairs of spotted owls and their progeny. Conservation Recommendations: Protect pairs of spotted owls by adjusting unit boundaries, providing buffers, and use of forest practices which provide spotted owl habitat components.	Reasonable and Prudent Measures: Implement restrictions during the nesting season to protect pairs of spotted owls and their progeny. Conservation Recommendations: Protect pairs of spotted owls by adjusting unit boundaries, providing buffers, and use of forest practices which provide spotted owl habitat components.

(continued)

Sales Type	Limitations on Reasonable and Prudent Measures and Conservation Recommendations	Basis: Current Agency Management Plan Scenario Reasonable and Prudent Measures: Maintain adequate habitat within close proximity of pair sites and within their home ranges until a long-term conservation strategy is adopted. (See page 9, section on Incidental Take Guidelines under Sections 7 and 10.)	Basis: Agency Implementation of Interagency Scientific Committee Report Reasonable and Prudent Measures: Protect pairs of spotted owls within HCAs by providing a ½ mile buffer around the pairs activity center. Outside HCAs protect 80 acres surrounding pair activity centers (as specified in the ISC Strategy). Implement seasonal restrictions during the nesting season to protect pairs of spotted owls and their progeny.
1990 Planned but Unsold Sales, including Sales proposed under Section 318	Limited time available to make adjustments during the planning process and coordinate the changes before fiscal year 1990 contracting deadlines. Additional expenses may be necessary to make changes.		

Conservation Recommendations: Adopt the Interagency Scientific Committee Conservation Strategy, and eliminate or relocate timber harvest activities to areas outside proposed HCAs.

Conservation Recommendations: Eliminate or relocate timber harvest to areas outside HCAs.

(continued)

Sales Type	Limitations on Reasonable and Prudent Measures and Conservation Recommendations	Basis: Current Agency Management Plan Scenario	Basis: Agency Implementation of Interagency Scientific Committee Report
1991 and Future Sales	No known limitations	Reasonable and Prudent Measures: Maintain adequate habitat within close proximity of pair sites and within their home ranges until a long-term conservation strategy is adopted. (See page 9, section on Incidental Take Guidelines under Sections 7 and 10.)	Reasonable and Prudent Measures: Implement restrictions during the nesting season to protect pairs of spotted owls and their progeny that are located outside HCAs.

Conservation Recommendations: Adopt the Interagency Scientific Committee Conservation Strategy, and eliminate or relocate timber harvest activities to areas outside HCAs.

Conservation Recommendations: Protect pairs of spotted owls by adjusting unit boundaries, providing buffers, and use of forest practices which provide spotted owl habitat components.

It is not possible to determine an exact point at which the continued existence of a species would be at jeopardy without fully analyzing proposed actions in relation to the environmental baseline. Therefore, the Service will analyze each Federal action submitted for formal consultation in turn and will make the "likely jeopardy/not likely jeopardy" finding on a case-by-case basis.

o INCIDENTAL TAKE GUIDELINES UNDER SECTIONS 7 AND 10

The taking of any listed species is generally prohibited under Section 9 of the ESA and implementing regulations. There are, however, a number of exceptions to the taking prohibition.

The 1982 Amendments to the ESA gave the Service procedures to authorize the "incidental take" of listed wildlife species. These procedures are contained in Sections 7 and 10 of the ESA. "Incidental take" in this context is take which is "incidental to, and not the purpose of, carrying out otherwise lawful activities" (See 16 USC 1539 and Sec. 10(a)(1)(B) of the ESA).

The Service offers the following general guideance to address "incidental" take of northern spotted owls that may occur incidentally to timber harvest or related activities. The Service gives notice that any incidental take of northern spotted owls that results from activities carried out in a manner inconsistent with the guidelines (and not authorized under the provisions of Section 7 or Section 10 of the Act), will be subject to investigation by the Service pursuant to Section 9 of the Act.

It is important to note that the Service fully intends to consider all requests for incidental take authorizations under Section 7 (Federal) or Section 10 (State and private) of the Act, as appropriate. These interim guidelines are intended to present, to the best of our ability, guidance for addressing the need for

incidental take authorization; and therefore to provide guidance for reducing potential conflicts with Section 9 of the Act.

An obvious incidental take situation would exist if an otherwise lawful timber harvest activity would result in the direct loss of any individual (adult or young), or an active nest (with young or eggs). It is more difficult to determine when incidental take of owls might occur as a result of altering habitat surrounding a nest site or activity center of a pair of spotted owls.

Even more difficult is assessing when owls may be harmed or harassed by cutting within their home range. In these less obvious situations, the Service recommends that the project proponent initiate a dialogue with the Service to discuss the potential risk of incidental take. In the absence of such a dialogue, the Service offers the following stepwise approach which we believe is a reasonable procedure to reduce the risk that incidental take will occur. If the person engaged in timber harvest can demonstrate that these guidelines were followed, the Service does not intend to seek prosecution in the unlikely event that incidental take occurs in spite of implementing the guidelines.

The focus of our incidental take guidelines is on northern spotted owls, including their eggs and young. We therefore recommend the following stepwise approach to avoid and reduce the risk of incidental take:

1. Conduct spotted ow surveys during the breeding season and prior to any harvest activity according to the Forest Service protocols addressed in the Interagency Scientific Committee report. The Service may suggest other owl survey techniques in the near future. Such surveys should be a standard practice for planning timber harvest activities.

2. Avoid any harvest activity which results in less than 70 acres of the best suitable owl habitat encompassing the nest site and/or activity center of a pair of spotted owls.

3. Avoid any harvest activity which results in less than 500 acres of suitable habitat within a 0.7-mile radius (1000 acres) of a nest site and/or activity center. The 500 acres may include the 70 acres in No. 2 above and should be as contiguous as possible.

4. Avoid any harvest activity which results in less than 40 percent coverage by suitable owl habitat within a circle with a radius centered on a nest site/or center of activity and as prescribed by physiographic province (see Table 2). The 40 percent may include the acreage required in No. 2 and No. 3 above.

The Service recognizes that there is variation among individuals. Specific information on home range size, habitat use, nest site, or the center of activity of well-studied owls in similar habitat in the same portion of the range could be used to justify an exception to these guidelines and continue to avoid incidental take. In addition, habitat use information on which the above recommendations are based (see ISC 1990, USDI 1990) may change as a result of more recent studies, and the Service will continue to update its database to ensure that the most recent information is included.

To summarize the procedures for pursuing incidental take authorization for non-Federal activities, if incidental take is identified as a concern on State or private lands, individual landowners should consider development of a habitat

conservation plan. The Section 10 (a)(1)(B) permit application can be submitted separately by individual applicants or through the appropriate State agency as described in the discussion on Section 10 permits in this document. The Service strongly encourages a pre-application dialogue with any potential permit applicant at any time.

Table 2. Calculations to Develop Incidental Take Guidelines Based Upon Home Range Size by Physiographic Province[1]

Province	Median Home Range Size		40 Percent of Median Home Range Size
	Acres	Radius	Acres
WASHINGTON			
Olympic Peninsula	9900	2.2 miles	3960
Cascades	6600	1.8 miles	2640
OREGON			
Cascades	2500	1.2 miles	1000
Coast Range	3400	1.3 miles	1360
Klamath	2500	1.2 miles	1000
CALIFORNIA			
Klamath	2500	1.2 miles	1000

[1] The Service will continue to revise this table as more data become available.

References:

Interagency Scientific Committee. 1990. Conservation strategy for the northern spotted owl. Report of the Interagency Scientific Committee to address the conservation of the northern spotted owl. U.S. Department of Agriculture, Forest Service, and U.S. Department of the Interior, Fish and Wildlife Service, Bureau of Land Management, and National Park Service. Portland, Oregon.

U.S. Department of the Interior. 1990. 1990 Status Review. Northern Spotted Owl. Report to the U.S. Fish and Wildlife Service. Portland, Oregon.

o HABITAT CONSERVATION PLANNING UNDER SECTIONS 9 AND 10

A permit from the Service pursuant to Section 10(a)(1)(B) of the ESA authorizes incidental take much as a Section 7 consultation does through an "Incidental Take Statement" for Federal actions. However, Section 10 of the ESA typically applies to non-Federal actions. Individuals, corporations, non-Federal government entities, States, and other parties can apply for an incidental take permit by submitting an application and a habitat conservation plan to the Service. "Conservation Planning" is the term often used to refer to this process. In the case of the owl, the Service recommends maximizing efficiency of effort by developing a habitat conservation plan which includes the incidental take requests for a number of entities through the appropriate State land-managing agency.

The issuance of an incidental take permit by the Service is contingent upon the applicant's development of a Service-approved conservation plan for the listed species affected by the subject project or action (a more detailed document, "Draft

Conservation Planning Guidelines," is available from the Service's Portland Regional Office). Such a conservation plan must specify:

1. the anticipated impacts likely to result in take of listed species;
2. the mitigation and monitoring measures the applicant will undertake to alleviate the impacts of the taking;
3. alternative actions to such taking that were considered;
4. why these alternatives were not employed;
5. funding that will be provided to implement the mitigation measures and attendant conservation plan; and
6. additional measures that the Service may require as necessary or appropriate for the conservation of the species.

Because applicants may have difficulty in adequately addressing these conservation planning needs independently, the Service generally works with an applicant throughout the pre-application phase. Adequate quantification of impacts (i.e., incidental take) usually requires that the applicant: (1) define the conservation planning area, (2) collect necessary biological data on the species of concern, and (3) detail the proposed activities likely resulting in incidental take.

Upon receipt of the application and conservation plan, the Service may issue an incidental take permit if it determines that the following conditions have been met:

1. the taking will be incidental to the action;
2. the applicant will, to the maximum extent practicable, minimize and mitigate the impacts of taking;

3. the applicant will ensure that adequate funding will be provided for the conservation plan and procedures to deal with unforeseen circumstances;
4. the taking will not appreciably reduce the likelihood of the survival and recovery of the subject species in the wild;
5. the applicant will ensure that other measures required by the Service will be provided; and
6. the plan will be implemented.

The third item above generally requires the development of an implementing agreement, which is a legal document binding all implementing parties to the proposed conservation plan.

The Service must also address the National Environmental Policy Act (NEPA) in the ESA Section 10(a)(1)(B) permit process. In most cases the Service delegates the development of information needed for preparation of NEPA documentation to the applicant to expedite the process. In general, if the incidental take permit will result in a significant net loss of individuals and/or habitat, an EIS likely will be required. This often adds 9 months to 1 year to the process. Conversely, if the permit will result in a net gain or insignificant net loss of individuals and/or habitat, an environmental assessment leading to a finding of no significant impact likely will be sufficient for NEPA compliance. In such a scenario, a permit could be considered for issuance in as little as 3 months.

Section 10 and Northern Spotted Owls

Timber harvest on State and private lands may result in the incidental take of northern spotted owls. Because the States authorize private timber harvest, they may be party to take on private lands, as well as on State lands. In the absence of an incidental take permit, this take would be a violation of ESA.

The implications for the northern spotted owl are considerable, since a large portion of the total harvest volume in the owl's range comes from non-Federal lands. At least in California, important numbers of owls occur on private lands; there are fewer owls on private lands in Washington and Oregon.

There are two approaches to managing the Section 10 process for spotted owls. One is for the individual landowner to prepare an HCP and apply for an incidental take permit for his lands. The second is for the State to prepare an HCP for all state and private timber lands. The Service would prefer to proceed with the latter approach, since it would add efficiency to the conservation planning process.

The States of Washington, Oregon, and California are at different stages in this process. In Washington and Oregon, the Service has notified the States of their potential responsibilities and initial informational discussions are beginning. In California, the State Board of Forestry, Department of Forestry, Department of Fish and Game, industry representatives, and the Service have been meeting regularly since November, 1989.

The State of California is planning to prepare an HCP covering timber management throughout the range of the subspecies in the state. The California HCP and accompanying NEPA process probably may not be completed until sometime in 1991. During the interim period, the State would attempt to prevent take through a review process that supplements its existing timber harvest permit procedure. In the meantime, large industrial timber firms have indicated their intent to proceed with individual HCPs.

o RECOVERY PLANNING UNDER SECTION 4

Section 4(f) of the Endangered Species Act requires development and implementation of recovery plans for listed species.

Recovery actions are meant to arrest or reverse the species' decline and neutralize the threats to its survival so that its long-term survival in the wild can be ensured.

A recovery plan delineates, justifies, and schedules the research and management actions necessary to support recovery of the species. Coordination among Federal, State, local agencies, organizations, and private entities is essential. Although recovery plans do not commit manpower or funds, they must identify site-specific management actions, estimate the time frame and costs for recovery, identify research needs, and establish measurable goals for recovery.

A recovery plan contains three parts. Part 1 is an overview of the species, its biology, life history, habitat requirements, and discussion of the threats that have led to its listing as an endangered or threatened species. Part 2 identifies the Service's goals and objectives for recovery of the listed species. These are presented in a step-down outline that recommends the steps that should be taken to help recover and delist the species. In most cases these recommendations are research oriented. Any recommended management actions may require NEPA documentation prior to implementation. Part 3 provides an implementation schedule that identifies the key players and the costs associated with recommended projects.

Development of a recovery plan requires a public review process prior to approval of the plan. There are no specific time frames associated with the development of a recovery plan, and a plan is not necessary for the Service to conduct Section 7 consultation, carry out research and management activities, or identify goals and objectives for the species. If the Service follows the normal procedure for producing a recovery plan, it is anticipated that two years would be required to complete the necessary steps before a plan would be finalized. A process for developing a recovery plan under these circumstances is described in

Appendix 4. Specific guidelines that describe the recovery planning process are available from the Service.

Interagency Scientific Committee Conservation Strategy

The Fish and Wildlife Service, Forest Service, Bureau of Land Management, and the National Park Service entered into a charter under the 1988 Interagency Agreement on spotted owls to establish an Interagency Scientific Committee (Committee). This Committee was also recognized by Congress in Section 318 of Public Law 101-121. The purpose of this Committee was to assess all available information on the management and biology of the northern subspecies and recommend a strategy for the conservation of the northern spotted owl. The Committee submitted "A Conservation Strategy for the Northern Spotted Owl" to report to Congress and the four agencies on April 4, 1990. The Forest Service must report to Congress on its intentions towards management of the owl by September 30, 1990.

As noted above, the Committee has produced a scientifically credible strategy for the long-term viability of the northern spotted owl. The agencies have endorsed the science associated with this plan, and are presently reviewing it to determine its acceptability as an approach to managing the owl under their multiple-use responsibilities. The Committee has utilized the best scientific information available, including contact with or the participation of all the most knowledgeable spotted owl experts in the process to develop this strategy.

The Service believes that this report represents the most comprehensive and in-depth analysis of the data available. The Service fully endorses the scientific credibility of the report and its applicability as a management approach for the northern spotted owl. Given this, the Service is reviewing this document

for its applicability as a recovery plan under the Endangered Species Act (see Appendix 4).

This process followed to produce the ISC's plan has met two of the Service's requirements for development of a recovery plan. First, the most knowledgeable owl experts available, representing all major constituencies, were involved in its development. Secondly, the best available information was used to develop the strategy. Establishment of recovery goals, evaluation of the conservation strategy relative to these goals, and inclusion of a public review process would be required to complete the process.

In the interim, the Service strongly recommends that the agencies consider implementation of the conservation strategy, as fully described by the Committee. Acceptance and implementation of the strategy, as recommended, would provide a sound basis for Section 7 consultation, help address the issue of take on Federal and private lands, and reduce concern over the economic impacts of recovery and species management.

The conservation strategy includes a process for revision of the strategy as more and better information becomes available. In addition, the Service has recently established a coordinating committee under a 1990 interagency agreement (Attachment 5) with the States of California, Oregon and Washington, and the USDA Forest Service, Bureau of Land Management, and National Park Service. The intent of this new agreement is to provide a forum to coordinate the management and conservation of the northern spotted owl. The Services believes that these processes allow for an open and appropriate forum for consideration and inclusion of recovery goals, other issues that may arise, as well as adjustment of the strategy itself that may be required during its implementation.

CONCLUSION: OWL PROCEDURES MANUAL

The Tables and Appendices noted in the narrative are attached. The Owl Procedures Manual will be updated and augmented as new information becomes available. Components of future consultations, such as development of incidental take statements, will generally follow the direction of this manual, but may change based on new biological information and professional judgment.

APPENDICES

to

OWL PROCEDURES MANUAL

APPENDIX 1: Biological Assessment Information

In general, biological assessments for the pre-1989 and 1989-1990 timber sale programs should contain the following information. The Service will work with the agencies to identify the data needs for future sale reviews.

Biological Assessment Format

1. Introduction

   - Brief summary of the objectives of the Biological Assessment; reference the Forest plans or timber plans under which sales were prepared.

   - Address other listed species (species for which the "may affect" standard applies, or acknowledgement that such species have been consulted on separately).

2. Description of the Proposed Action

   - Description of the Forest Service's Pacific Northwest and Pacific Southwest Regions or the BLM Districts in Oregon including total acreage, description and amount of forested acres, and owl habitat information such as amount, distribution, etc., by land area under consideration. This information should be totalled by physiographic province and Forest or BLM District.

   - Description of the timber sale program being addressed.

- For pre-1989 sales, where discretionary authority is retained, provide the following information, totaled by physiographic province and Forest or BLM District:

  a. total number and volume of sales, and acreages by type (clearcut, shelterwood, amount and type of salvage, etc.)

  b. number and list of "no effect" sales and justification for this determination.

  c. number and list of "may affect" sales, including volumes and acreages of suitable and unsuitable habitat. - indicate in the two lists above those sales that are located fully or partially within HCAs, SOHAs, Areas of concern, and/or ODFW/BLM agreement sites.

- For 1989-1990 sales, provide the following information, totalled by physiographic province and Forest or BLM District;

  a. total number and volume of sales, and acreages by type (clearcut, shelterwood, amount and type of salvage, etc.);

  b. number and list of "no effect" sales and justification for this determination;

  c. number and list of "may affect" sales, including volumes and acreages of suitable and unsuitable habitat, for both discretionary and non-discretionary sales; also indicate if the sale has been surveyed 0, 3, or 6 times, and whether the sale complies with the 50-11-40 rule

d. indicate in the lists above, those sales that are located fully or partially within HCAs, SOHAs, Areas of Concern, and/or ODFW/BLM agreement sites.

e. description of other activities that may be subject to future Section 7 consultation.

3. Description of the Affected Environment

- Definition of spotted owl habitat and the amount in acres within each physiographic province, Forest and BLM District.

- Biological data on listed species (historical use, presence, potential use); information and/or other documents containing such information may be incorporated by reference

- Spotted owl information (from data bases, 1985 to Present) should include information on all owls, pairs and singles, and those unaffected by the timber sale programs.

4. Analysis of the Effects of the Action

- General description

- Direct and indirect effects such as habitat loss, dispersal habitat, number of owl pairs affected, etc. Indicate the amount of owl habitat (distinguish dispersal habitat when possible) proposed to be removed or altered (from partial harvest) in each physiographic province and Forest. This section should also include a summary analysis of effects on owl pairs from

any or all of the following: sales within 0.5 mile of activity centers/nest sites; sales within 2.1/2.5 miles (home ranges); sales within 2.1/2.5 miles, where habitat would be reduced to below the minimum used by owl pairs in that province; and sales within Areas of Concern, as described in the Service's 1989 Status Review on the owl. It is important that this summary reflect the cumulative impacts to an owl pair from all sales affecting the pair.

- Interrelated and interdependent actions such as roads, silviculture treatments, recreational projects, etc.

- Cumulative impacts - future State and private actions, especially when these activities would affect owl pairs with home ranges overlapping federal and state or private lands.

- Brief discussion of other listed species - provide an analysis of effects of the action to other listed species.

5. Alternatives Considered

- Brief discussion of alternatives for sale, etc.

- Describe conservation measures implemented to reduce or minimize impacts to spotted owls or habitat.

- Prepare a contingency plan for situations where owl pairs are found in active timber sales.

- Summary of program changes as a result of the above (for 318 package). Forest Service Region 5 will provide changes in the 1989-1990 sales program.

6. Conclusions (for the timber sale package submitted for formal consultation)

   - How will the action (package) affect each listed species:

     a. no adverse affect;
     b. may adversely affect; or
     c. may beneficially affect?

   -- Request consultation for those which may affect (adversely or beneficially).

Information Needs

To aid our analysis of impacts to owls in the biological opinions, and to complete our administrative record, the Service has requested that the agencies provide information, in a Table format, on owls and owl habitat.

- Number and list of owl pairs and singles (including those whose status is unconfirmed), by Forest or BLM District. This list should include those pairs whose home range or 2.1/2.5 miles radius circle overlaps adjacent state or private lands.

- For each owl pair affected by the program, provide the following information:

a. pre-harvest acres of suitable habitat available to the pair within 0.5 miles and between 0.5 and 2.1/2.5 miles.

b. acres of owl habitat removed within those distances, for each sale and for all sales (cumulative); and

c. whether the pair is located in an area of concern, HCA, SOHA, or ODFW/BLM Agreement area.

- Database tables for individual timber sales brought forward for consultation.

- Short narratives from each Forest and BLM District to address selected parts of the above outline and summarize the biological evaluations for each sale.

The following provides a description of the general format that the Service follows when it provides a biological opinion to an action agency under Section 7 of the ESA.

Biological Opinion Format

1. Introduction
   a. Identify the issue and species in consultation

2. Biological Opinion
   a. Succinct statement (...is/is not likely to jeopardize, ...will/will not adversely modify critical habitat) for each species.

3. Description of the Proposed Action
   a. Cite Public Notice, EIS, plan document, or rationale for packaging from biological assessment.
   b. Include interrelated, interdependent actions considered.

4. Species Account
   a. Status and biology of listed and proposed species.

5. Effects of the Proposed Action on Listed Species
   a. Cite past Opinions to same agency, recovery plans, Biological Assessments, etc., for species accounts.
   b. Include species information relevant to action area.
   c. Explain effects that are adverse or beneficial.
   d. If jeopardy, stress aspects that cause jeopardy.
   e. Provide a basis for reasonable and prudent alternatives, and/or conservation recommendations.

6. Cumulative Effects

7. Reasonable and Prudent Alternatives
   a. If appropriate, but only for jeopardy findings.

8. Incidental Take
   a. Include sections in order.
      1. anticipated incidental take.
      2. reasonable and prudent measures to minimize incidental take.
      3. terms and conditions necessary to implement reasonable and prudent measures.
      4. instructions on disposition of dead animals.
   b. See Table 1 in this document

9. Conservation Recommendations
   a. See Appendices 3A and B in this document.

10. Closing

11. Literature Cited

APPENDIX 3A: Section 7 Consultation - Example Conservation Recommendations likely to be Recommended if the Interagency Scientific Committee Conservation Strategy Serves as the Basis for Consultation

The Service will provide conservation recommendations under Section 7(a)(1). These recommendations are not mandatory, but are intended to assist the agency in implementing actions that may result in the conservation of the owl.

1. The Forest Service and Bureau of Land Management should coordinate with the Service to develop a tracking procedure that will monitor implementation of the sale program and document the following: the total number of owls impacted and at what levels; and the total amount of owl habitat removed from the environmental baseline.

2. Proposed sale areas and owl sites should be surveyed a minimum of 6 times within a given season to provide a reasonably accurate data base from which to make sound management decisions.

3. The Forest Service and Bureau of Land Management should coordinate with the Service and State resource agencies to design and conduct spotted owl research and monitoring efforts, including banding and telemetry programs and studies of habitat utilization.

4. Design, implement, and monitor timber harvest prescriptions to minimize impacts to the spotted owl and, in the long term, create or restore the necessary components of owl habitat. Consider testing the following prescriptions on a site specific basis, as appropriate:

a. Selectively harvest to retain a specified number of green trees per acre, thereby facilitating more rapid development of a multi-layered canopy.

b. Leave sufficient snags and down woody material to provide for the prey base requirements for spotted owls. Refer to the research paper by Spies, et al. (1988) for guidelines. Coordinate with fire and pest management specialists.

c. Burn post-harvest fuels only as necessary for fuel reduction and insect control. Retain large down logs where possible. Coordinate with fire and pest management specialists.

d. Treat stands of young trees to facilitate more rapid production of large trees and well-developed multi-storied stands.

e. Create or improve the decadent tree component by topping or girdling large trees. Coordinate with fire and pest management specialists.

f. Selectively harvest to encourage understory development while retaining overstory canopy closure of 40% or more.

    1. Leave sufficient green trees (at least 12 per acre, individually and in clusters of mixed species and ages) to serve as the upper canopy layer as habitat recovers its value for nesting, roosting, and foraging activities of spotted owls; and

g. Within shelterwood harvests, leave 8-15 mature trees per acre to provide the components of

spotted owl nesting, roosting, and foraging habitat. Eliminate the final overstory removal phase.

5. Work closely with adjacent Federal, State, and private landowners to properly manage spotted owl habitat on a landscape level, monitor owls and the effects of timber sale-related activities, and design sales to avoid adverse impacts to spotted owls.

6. Consider evaluating allowable sale quantities on an acreage basis in addition to a volume basis to provide increased flexibility in managing for spotted owls and other environmental values in terms of habitat capabilities.

7. Adjust the timber base through your planning process to account for habitat reserved or managed for the spotted owl to help assure its long term survival.

8. Consider reducing the annual allowable sale quantities to facilities implementation of the ISC Conservation Strategy and conserve spotted owl habitat.

9. Coordinate the funding, development, and maintenance of a geographic information system that is compatible between Federal and State land management and fish and wildlife resource agencies for the long-term tracking of spotted owls and their habitat.

APPENDIX 3B: Section 7 Consultation - General Conservation Recommendations Likely to be Recommended if the Interagency Scientific Committee Conservation Strategy does Not Serve as the Basis for Consultation

These recommendations are based upon the Service's knowledge of current management scenarios being pursued by the Forest Service (SOHA system) and Bureau of Land Management (ODFW agreement areas).

1. Eliminate or relocate the timber sales/units that are within 0.5-miles of a pair, and/or would reduce the amount of owl habitat to less than the minimum known to be used by owl pairs in each province.

2. Eliminate or relocate timber sales/units in areas of special concern (as identified in the Service's 1989 Status Review) unless an interagency plan for the conservation of dispersal habitat has been implemented.

3. Prioritize timber sales so that sales not impacting spotted owl pairs and/or spotted owl habitat are contracted first. Sales which have a minor impact should be contracted second, and sales that have a major impact should be offered last and only when absolutely necessary.

4. The Forest Service and Bureau of Land Management should coordinate with the Service to develop a tracking procedure that will monitor implementation of the sale program and document the following: the number and kinds of recommendations that are implemented; the total number of spotted owls impacted and to what degree; and the total amount of spotted owl habitat removed from the environmental baseline.

5. Proposed sale areas and owl sites should be surveyed a minimum of 6 times within a given season to provide a reasonably accurate data base from which to make sound management decisions.

6. The Forest Service and Bureau of Land Management should coordinate with the Service and State resource agencies to design and conduct spotted owl research and monitoring efforts, including banding and telemetry programs and studies of habitat utilization.

7. Management plans should be developed, in coordination with state and Federal wildlife agencies and the Forestry Sciences Labs, to provide for the long-term development and maintenance of nesting, foraging, and dispersal habitat necessary to maintain the northern spotted owl. Particular attention should be paid to avoiding impacts to spotted owls and restoring habitat within the identified areas of special concern.

8. Timber harvest activities should be minimized within relatively large, contiguous blocks of spotted owl habitat. Consider aggregating, instead of dispersing, these activities within the forest landscape, to avoid increasing fragmentation of remaining spotted owl habitat. Allow for changes in harvest prescription, from clearcut to commercial thinning or individual tree marking, to preserve necessary owl habitat components.

9. Design, implement, and monitor timber harvest prescriptions to minimize impacts to the spotted owl and, in the long-term, create or restore the necessary habitat components of owl habitat. Consider testing the following prescriptions on a site specific basis, as appropriate:

a. Selectively harvest to retain a specified number of green trees per acre, thereby facilitating more rapid development of a multi-layered canopy.

b. Leave sufficient snags and down woody material to provide for the prey base requirements for spotted owls. Refer to the research paper by Spies, et al. (1988) for guidelines. Coordinate with fire and pest management specialists.

c. Burn post-harvest fuels only as necessary for fuel reduction and insect control. Retain large down logs where possible. Coordinated with fire and pest management specialists.

d. Treat stands of young trees to facilitate more rapid production of large trees and well-developed multi-storied stands.

e. Create or improve the decadent tree component by topping or girdling large trees. Coordinate with fire and pest management specialists.

f. Selectively harvest to encourage understory development while retaining overstory canopy closure of 40% or more.

- Leave sufficient green trees (at least 12 per acre, individually and in clusters of mixed species and ages) to serve as the upper canopy layer as habitat recovers its value for nesting, roosting, and foraging activities of spotted owls; and

- Within shelterwood harvests, leave 8-15 mature trees per acre to provide the

components of spotted owl nesting, roosting, and foraging habitat. Eliminate the final overstory removal phase.

10. Work closely with adjacent Federal, State, and private landowners to properly manage spotted owl habitat on a landscape level, monitor owls and the effects of timber sale-related activities, and design sales to avoid adverse impacts to spotted owls.

11. Consider evaluating allowable sale quantities on an acreage basis in addition to a volume basis to provide increased flexibility in managing for spotted owls and other environmental values in terms of habitat capabilities.

12. Adjust the timber base through your planning process to account for habitat reserved or managed for the spotted owl to help assure its long term survival.

13. Consider reducing the annual allowable sale quantities to facilitate implementation of the ISC Conservation Strategy and conserve spotted owl habitat.

14. Coordinate the funding, development, and maintenance of a geographic information system that is compatible between Federal and State land management and fish and wildlife resource agencies for the long-term tracking of spotted owls and their habitat.

APPENDIX 4: Recovery Strategy

Approach 1: If the agencies implement the ISC conservation strategy as a management plan for the northern spotted owl, the Service can use this approach as an interim recovery plan while the strategy is being assessed through the recovery planning process for its applicability and acceptability as a formal recovery plan. Therefore, the Service recommends the following approach:

June/July 1990

- The agencies indicate their acceptance and intentions towards implementation of the Conservation strategy.

- The Service will convene a group of recognized experts (which may include members of the Scientific Committee and the Listing Review Team) to review the strategy in relation to the requirements and mandates of the Endangered Species Act and the feasibility of adopting the ISC plan for recovery planning purposes.

July 1990

- A report will be provided to the Service on the applicability of the ISC Conservation Strategy as a recovery plan.

- The Service will announce a decision to proceed with the recovery planning process using either the Conservation Strategy or another approach.

  - If the Conservation Strategy is appropriate as a recovery plan, the Service will pursue its obligations to consider public input prior to

finalization of the document as a recovery plan and to complete the planning processes.

- If the Service decides to pursue development of another recovery planning document, procedures described in Approach 2 would be followed.

January 1991

o Finalize and approve recovery plan (if the ISC strategy is the recommended approach).

Approach 2: If the Service follows a normal process for developing a recovery plan, it is recommended that a "classic" scientific recovery team be established for the owl. Through the ISC team effort and the Listing Review Team there are a number of highly qualified persons identified as good candidates to serve on the Team. As a mechanism for the science of recovery to interface with land management concerns, the Team Leader should participate in the Interagency Northern Spotted Owl Conservation Group (formally ISOC) meetings. The ISC report provides a good starting point for a recovery plan; the Service will need to look closely at this document in establishing recovery goals and objectives.

July 1990

o Send out letters to agencies, universities, etc. requesting nominations to recovery team. Expertise will be sought in the following areas:

1. northern spotted owl ecology,
2. conservation biology,
3. population genetics,
4. population ecology,

5. biogeographical modeling with expertise in geographic information systems; and
6. old growth forest management.

August 1990

- Select recovery team, and schedule first team meeting.

September 1991

- Complete draft recovery plan for public review and comment.

March 1992

- Finalize and approve a recovery plan.

April 1992 and Beyond

- Implement the recovery plan. This could be done using an implementation team approach. Representatives would include those from: Forest Service, Bureau of Land Management, State wildlife agencies, State forestry departments, timber industry, and environmental groups.

- A management oversight group and technical group could be formed to advise the Service (oversee) research and management actions affecting recovery of the northern spotted owl.

APPENDIX 5: 1990 Interagency Agreement (attached)

MEMORANDUM OF AGREEMENT

AMONG

STATE OF CALIFORNIA
THE RESOURCES AGENCY

STATE OF WASHINGTON
DEPARTMENT OF WILDLIFE,

STATE OF OREGON
DEPARTMENT OF FISH AND WILDLIFE,

U.S. DEPARTMENT OF THE INTERIOR
FISH AND WILDLIFE SERVICE,
BUREAU OF LAND MANAGEMENT,
NATIONAL PARK SERVICE,

AND

U.S. DEPARTMENT OF AGRICULTURE
FOREST SERVICE

TO ESTABLISH AN INTERAGENCY
NORTHERN SPOTTED OWL CONSERVATION GROUP

This Memorandum of Agreement ("Memorandum") is entered into this 13th day of April, 1990, among the State of California Resources Agency, the Oregon Department of Fish and Wildlife, the Washington Department of Wildlife, the U.S. Fish and Wildlife Service, the USDA Forest Service, the Bureau of Land Management, and the National Park Service (collectively called the "Public Agencies").

WHEREAS, all parties to this Memorandum of Agreement recognize that they each have responsibilities under

their statutory authorities that cannot be delegated and that this Memorandum cannot and is not intended to abrogate any of their independent decision-making responsibilities, and

WHEREAS, the Public Agencies are among the Federal and State agencies that have regulatory authority or responsibility under certain Federal and State statutes to manage for the northern spotted owl (Strix occidentalis caurina) and its habitat, and

WHEREAS, the multiple sources of authority under which the Public Agencies operate do not provide any individual agency with the authority to implement a comprehensive program to provide for the long-term conservation of the northern spotted owl across its historic range, and

WHEREAS, the Federal Agencies have entered into an interagency agreement to cooperate in ensuring the conservation of the spotted owl, and

WHEREAS, the Public Agencies desire that their activities, to fulfill their respective responsibilities with regard to the conservation of the northern subspecies of the spotted owl, be coordinated in such a manner as to ensure effective, timely, and mutually beneficial use of financial and personnel resources, and

WHEREAS, the Public Agencies share the common goal of ensuring the conservation for the northern spotted owl,

THEREFORE, it is mutually agreed and understood that:

PURPOSE OF MEMORANDUM

The Public Agencies have entered into this Memorandum to establish an Interagency Northern Spotted Owl Conservation

Group to develop and ensure compliance with cooperative programs related to the conservation of the northern spotted owl.

INTERAGENCY NORTHERN SPOTTED OWL CONSERVATION GROUP

Secretary, State of California, The Resources Agency

Director, State of Washington, Department of Wildlife

Regional Director, U.S. Fish and Wildlife Service, Portland, Oregon

Regional Forester, U.S. Forest Service, Portland, Oregon

Director, Pacific Northwest Experiment Station, Portland, Oregon

Regional Forester, U.S. Forest Service, San Francisco, California

State Director, U.S. Bureau of Land Management, Portland, Oregon

State Director, U.S. Bureau of Land Management, Sacramento, California

Regional Director, National Park Service, San Francisco, California

Regional Director, National Park Service, Seattle, Washington

Director, State of Oregon, Department of Fish and Wildlife

OPERATION

1. The Regional Director of the U.S. Fish and Wildlife Service shall chair the Interagency Northern Spotted Owl Conservation Group (Interagency Group) for a period of 2 years from the date of execution of this agreement. Chairperson of the Interagency Group shall rotate on an annual basis among the participating agencies. Future chairpersons will be chosen by the Interagency Group.

2. The Interagency Group will meet as frequently as agreed upon by a majority of the voting members. Meetings shall be called by the Chairperson.

3. The Interagency Group may establish, or rely on, existing coordinating or working groups, as necessary or appropriate, to address specific issues relative to northern spotted owl conservation.

RESPONSIBILITIES

1. Identify, consider, and recommend, as appropriate, management and research activities for the conservation of the northern spotted owl.

2. Direct activities of any coordinating or working groups established by the Interagency Group.

3. Exchange information, coordinate, and provide standards and guidelines for needed management, monitoring, and research activities related to the conservation of the northern spotted owl.

4. Serve as a discussion forum for and liaison with all interest groups to serve as a common source of information and to address identified problems or conflicts.

5. TERM AND AMENDMENTS

This agreement is subject to all applicable laws and regulations. This Agreement may be amended upon the written consent of all parties. Parties to this Agreement may withdraw from this Agreement at any time upon written notice to the Interagency Group chair.

All signatories to this Memorandum agree to seek mutually agreeable solutions to achieve its purposes.

IN WITNESS WHEREOF, THE PARTIES HERETO have executed this Memorandum, on the date(s) set forth, as of the day and year last written.

Memorandum of Agreement to Establish an Interagency Northern Spotted Owl Conservation Group

By /s/ unreadable Date April 13, 1990
Director, State of Oregon
Department of Fish and Wildlife
Portland, Oregon

By /s/ unreadable Date April 13, 1990
Director, State of Washington
Department of Wildlife
Olympia, Washington

By /s/ David M. Jay Date 4-13-90
for Regional Forester
U.S. Forest Service
San Francisco, California

By /s/ unreadable Date 4-13-90
Regional Forester
U.S. Forest Service
Portland, Oregon

By /s/ unreadable Date 4/13/90
Director
Pacific Northwest Experiment Station
Portland, Oregon

By /s/ unreadable Date April 13, 1990
Regional Director
U.S. Fish and Wildlife Service
Portland, Oregon

By /s/ unreadable Date April 13, 1990
for State Director
U.S. Bureau of Land Management
Sacramento, California

By /s/ Elaine Y. Zelinski Date April 13, 1990
for State Director
U.S. Bureau of Land Management
Portland, Oregon

By /s/ unreadable Date April 19, 1990
for Regional Director
National Park Service
San Francisco, California

By /s/ unreadable Date April 13, 1990
Acting Regional Director
National Park Service
Seattle, Washington

By /s/ unreadable Date April 19, 1990
Secretary, State of California
The Resources Agency
Sacramento, California

United States Department of the Interior
FISH AND WILDLIFE SERVICE

911 N.E. 11th Avenue
Portland, Oregon 97232-4181

October 2, 1991

Memorandum

To: Field Supervisor, Fish and Wildlife Enhancement Field Office
Sacramento, California (Attn: Wayne S. White)

Field Supervisor, Fish and Wildlife Enhancement Field Office
Portland, Oregon (Attn: Russell D. Peterson)

Field Supervisor, Fish and Wildlife Enhancement Field Office
Olympia, Washington (Attn: David C. Frederick)

Spotted Owl Coordinator, Fish and Wildlife Enhancement Region 1. Portland, Oregon (Attn: Barry Mulder)

From: Assistant Regional Director-Fish and Wildlife Enhancement

Subject: Northern Spotted Owl Guidelines for Compliance with the Endangered Species Act

The July 1990 document titled "Procedures Leading to Endangered Species Act Compliance for the Northern Spotted

Owl," is hereby rescinded. We will investigate the need for a regulation.

/s/ H. Dale Hall

cc:
Regional Solicitor's Office
(Attention: Ron Swan)

FILED
FEB 27 1992
Clerk, U.S. District Court
District of Columbia

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SWEET HOME CHAPTER :
OF COMMUNITIES FOR A :
GREAT OREGON, et al., :

Plaintiffs, :

v. : Civil Action No. 91-2218

JOHN F. TURNER, :
Director, U.S. Fish and :
Wildlife Service, et al., :

Defendants. :

MEMORANDUM ORDER

Plaintiffs in this case challenge certain guidelines issued by the United States Fish and Wildlife Service ("FWS") in 1990 which interpret the extent of timber harvesting activities that are permitted under the Endangered Species Act ("ESA"), 16 U.S.C. § 1531-1544 (1988). On October 2, 1991, the Assistant Regional Director for FWS of Region 1, in which plaintiffs are located, issued a memorandum rescinding the disputed guidelines. Federal defendants have now moved the Court to dismiss the case on mootness grounds. Upon consideration of defendants' motion, plaintiffs' opposition, the supporting memoranda of the

parties, and the entire record herein, the Court will hereby grant defendants' motion to dismiss.

BACKGROUND

In July 1990, Region 1 of the FWS issued a document entitled "Procedures Leading to Endangered Species Act Compliance for the Northern Spotted Owl" ("Guidelines"). In order for individuals to comply with the ESA, the Guidelines require them to refrain from timber harvesting in certain areas surrounding nest sites or activity centers of the northern spotted owl. On April 19, 1991, plaintiffs served defendants with a Notice of Intent to Sue letter, pursuant to section 10(g) of the ESA, 16 U.S.C. § 1540(g); plaintiffs then filed this action, on August 30, 1991, challenging the Guidelines as arbitrary and capricious and contrary to the statutory authority of the ESA and the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4332 (1988). The complaint requests this Court to declare that the Guidelines are inconsistent with the law, to set aside the Guidelines and remand them to FWS, and to enjoin FWS from applying the Guidelines.

On October 2, 1991, the Assistant Regional Director for Fish and Wildlife Enhancement of Region 1 issued a Memorandum to regional Field Supervisors advising them that the Guidelines had been rescinded and that FWS was "investigat[ing] the need for a regulation." On the basis of this memorandum, defendants now claim that this case is moot.

DISCUSSION

Under the two-prong test set out by the Supreme Court in County of Los Angeles v. Davis, 440 U.S. 625, 631 (1979), a dispute is moot if (1) there is no reasonable expectation that the alleged violation will recur, and (2) "interim relief or events have completely and irrevocably eradicated the effects of the alleged

violation." Although voluntary cessation of allegedly illegal conduct will not ordinarily deprive a court of the power to hear and decide a case, United States v. W.T. Grant Co., 345 U.S. 629, 632 (1953), where a defendant can meet the burden imposed by Davis, the controversy is nonjusticiable.

Here, defendants have voluntarily rescinded the challenged Guidelines. They have represented that they "will investigate the need for a regulation," but they have not indicated what shape any such future regulation might take. Although the Court cannot deny that there is a possibility that FWS might reinstate the Guidelines or issue a regulation which in essence reinstates them, such a possibility is, for the moment, merely speculative.[1] It certainly does not rise to the level of a "reasonable expectation." This Circuit has in the past refused to adjudicate a controversy involving allegedly unlawful agency regulations, where the secretary of an agency has subsequently withdrawn them:

> Although the road reclamation requirement [the challenged regulation which was withdrawn by the Secretary of the Interior] is certain "capable of repetition," if and when the Secretary repromulgates [the regulation], the regulation will be reviewable at that time. . . . It would be entirely inappropriate for

---

[1] Plaintiffs have offered nothing to support their speculation that the Guidelines might be reissued other than a newspaper article which makes it clear that the Guidelines have been rescinded. See Exhibit 2 to Plaintiffs' Mem. in Opp. to Defendants' Motion to Dismiss. The article also reports the possibility of new FWS regulations in the future, and one FWS spokesman states that "we still stand by our recommendations." Plaintiffs offer this statement as proof that FWS intends to reissue the Guidelines. However the spokesman's comment is made in the context of FWS' continued commitment to enforcement of the Endangered Species Act. This Court will not accept a statement taken out of context from a newspaper article as proof that FWS intends to reinstate the Guidelines.

> this Court to do as [plaintiff] suggests and issue an advisory opinion to guide the Secretary's rulemaking.

National Wildlife Federation v. Hodel, 839 F.2d 694, 742 (D.C. Cir. 1988).

By rescinding the Guidelines, FWS has provided plaintiffs with the relief they sought in their original complaint. In the prayer for relief in their complaint, plaintiffs ask the Court to declare the Guidelines contrary to law, set them aside, remand them to FWS, and enjoin FWS from seeking to apply them. Essentially, plaintiffs are seeking to prevent enforcement of the Guidelines. That is precisely what FWS has now done: FWS declared that the Guidelines were rescinded, thereby clearly indicating its intention no longer to apply or enforce them. Plaintiffs argue that the effects of the Guidelines have not been completely eradicated because many state enforcement policies were predicated on the Guidelines, and these state policies are still in place. However, it is entirely likely that these states, confronted with a rescission of the Guidelines, will abandon their Guideline-based enforcement policies. Plaintiffs also claim that FWS has so vigorously promoted the Guidelines that state officials feel FWS had put "a gun to their heads" to compel compliance. Even if this is true -- and again, plaintiffs offer only the quote of one state official from a newspaper article as evidence -- FWS effectively withdrew that gun when it rescinded the Guidelines.

The Court concludes that, through defendants' rescission of the Guidelines, there is now no reasonable expectation that the injuries alleged in plaintiffs' complaint will recur. A case should be dismissed as moot where, as here, "the possibility of continuing injury disappears while the lawsuit is pending." Committee in Solidarity with the People of El Salvador v. Sessions, 929 F.2d 742, 744 (D.C. Cir. 1991). Moreover, plaintiffs have received essentially all of the relief they originally

sought in their complaint. Thus, the Court will grant defendants' motion to dismiss this case for mootness.

Accordingly, it is this 26th day of February, 1992,

ORDERED that defendants' motion to dismiss be, and hereby is, granted; and it is further

ORDERED that this case be, and hereby is, dismissed.

/s/ Norma Holloway Johnson
NORMA HOLLOWAY JOHNSON
UNITED STATES DISTRICT JUDGE

BEFORE THE BOARD OF FORESTRY
OF THE STATE OF OREGON

In the Matter of Boise	) DOJ Case No.
Cascade's Walker Creek	) 629-430-NR002-92
Timber Harvest Operation	) Hearings Case No.
Plan	) 92-DOF-007

FINAL ORDER

Statement of the Case: On February 4, 1992, Boise Cascade Corporation, referred to as "Boise Cascade" hereinafter, submitted a written plan concerning a proposed harvesting operation in the Walker Creek area of Clatsop County. The plan was denied. On May 5, 1992, Boise Cascade submitted an amended written plan. The amended written plan was denied on May 15, 1992. Boise Cascade requested a hearing on June 12, 1992. A hearing was held in Salem, Oregon on October 20, 1992. Melinda L. Bruce and Jerome S. Lidz, Assistant Attorneys General, represented the Department of Forestry ("ODF"). Attorney Phillip D. Chadsey of Stoel Rives Boley Jones & Grey represented Boise Cascade. Charles Stone, Richard Skipper, Clint Smith and William A. Dryden appeared as witnesses. The Department of Forestry filed a post-hearing memorandum on November 4, 1992. Boise Cascade filed a reply memorandum on November 13, 1992.

A Proposed Order was served on the parties on December 17, 1992. Attorney Chadsey filed exceptions on behalf of Boise Cascade. The Oregon State Board of Forestry met in regular session on January 6, 1993, at the State Forester's Headquarters in Salem, Oregon. Melinda Bruce and Phillip Chadsey presented argument to the Board. After considering the record, the Board did approve and adopt the Hearing Officer's Proposed Order.

Legal Issue: Should the amended written plan for the proposed Walker Creek timer harvest operation be approved under the Forest Practices Act and OAR 629-24-809?

Hearing Officer's Findings of Fact: (1) Boise Cascade is a publicly held forest products company which owns and operates sawmills, plywood plants, and pulp and paper mills in Oregon. It also owns and manages commercial timberlands for the purpose of supplying wood to those facilities. (2) In October 1988, in a trade of commercial timberlands with Longview Fiber Corporation, Boise Cascade acquired some commercial timberlands in Clatsop County. (3) Boise Cascade subsequently harvested some timber from the lands and in October 1991 arranged a sale of all its Clatsop County lands to another company, Hampton. (4) A 64 acre parcel located in the SW 1/4, Section 6, Township 6 N., Range 6 N., was excluded from the sale. That parcel is referred to as the Walker Creek Unit hereinafter. (5) That property is presently and at all pertinent times has been zoned as commercial timberlands. (6) In 1988 the Oregon Department of Fish and Wildlife ("ODFW") declared the spotted owl to be a threatened species, although no protective measures were adopted at that time. (6A) As early as 1986, a male spotted owl had been observed on the Walker Creek Unit. In 1990, a pair of spotted owls nested and successfully hatched two young owls on the property. (7) In 1991, a Boise Cascade survey identified a singe female in the area. No nesting activity was observed.

(8) On January 7, 1992, Boise Cascade filed Notification Number 92-521-11022 giving notice to the State Forester of its intent to conduct an operation and harvest timber on the Walker Creek Unit. (8) Because of the location of protected waters on or near the unit and the unit's identification as spotted owl habitat, a written plan was required. (9) Boise Cascade filed the written plan on February 4, 1992. (10) The plan provided that, if a pair of owls nested in the operations area, no operations would be conducted during the critical period of use, March 1 to September 30, or until the young owls fledged. (11) The written plan was denied approval on February 24, 1992, on the ground that it failed to describe how the operation would be conducted to provide a 70 acre core area of suitable owl habitat consistent with the requirements of OAR 629-24-809.

(12) On May 5, 1992, Boise Cascade submitted an amended written plan. (13) The plan reported that a pair of spotted owls was then known to be nesting in a tree within the harvest area, although it was different from the nest site observed in 1990. (14) The plan provided that Boise Cascade would not conduct operations in the area while the owls were present. (15) With respect to habitat, the plan stated that there were more than 70 acres of commercial timberland immediately adjacent to Boise Cascade's property and owned by the State of Oregon which could provide habitat for the owls after the Boise Cascade property had been logged. None of these properties encompassed the nest site. (16) On May 15, 1992, approval of the amended written plan was denied on the stated ground that the plan filed to identify for protection a 70 acre area of suitable spotted owl habitat encompassing the nest site. (17) Forest Practices Forrester ("FPF") Richard E. Skipper's letter of denial made reference to a recent field inspection conducted by himself, Clint Smith, a wildlife and fisheries specialist with ODF, and Bosie Cascade's agent, during which 70 acres of suitable habitat was identified and which included 47 acres of Boise Cascade's Walker Creek Unit and 23 nearby acres on lands owned by a private owner and by the state. (18) The letter advised Boise Cascade that there were eight acres in the unit outside the designated suitable habitat that could be harvested or that the entire unit could be harvested if an incidental take permit was approved by the United States Fish and Wildlife Service ("USFWS").

(19) In August 1990, the Oregon State Forester adopted an interim administrative policy precluding timber harvest within a 70-acre core area of the best available spotted owl habitat around known nest sites or activity centers. (20) The 70-acre core area requirement was based on a similar requirement in the USFWS guidelines adopted after that agency on June 23, 1990 declared the spotted owl a "threatened species" under the federal Endangered Species Act. (21) The Oregon State Board of Forestry subsequently adopted OAR 629-24-809, which requires protection

of a 70-acre core area of suitable habitat encompassing the nest site.

(22) Following a public hearing on February 28, 1991, on March 29, 1991, a hearing officer filed with the State Forester a document entitled "Report of Hearing Officer, Summary of Testimony, Findings and Conclusions," which was concerned with the Board of Forestry's proposed Forest Practice Rule for protection of Northern Spotted Owl nest sites when conducting forest operations on state and private lands. (23) In October 1991, the USFWS rescinded its guidelines pertaining to spotted owls on privately owned lands. (24) On January 6, 1992, Melinda L. Bruce, Assistant Attorney General of the Natural Resources Section, sent a letter to Ted Lorensen, Unit Manager for Technical Support (Monitoring and Policy) for the ODF, advising him that the recision of the federal guidelines concerning the northern spotted owl had no effect on the validity of OAR 629-24-809.

(25) On June 3, 1992, Boise Cascade's representative, Bill Dryden, sent FPF Skipper a letter. (26) On June 16, 1992, Jerome Lidz, Assistant Attorney General, sent a letter to Dale Hall of USFWS, in which he stated that ODF did not purport to be acting under the authority of the federal Endangered Species Act in enforcing its Forest Practices rules. The letter further stated that a decision by the USFWS that no incidental take permit was required under federal law would not satisfy the Oregon administrative rule which allowed the issuance of such a permit by the USFWS as an alternative means of complying with state law. (27) On July 29, 1992, Assistant Attorney General Lidz sent a letter to Phillip Chadsey, counsel for Boise Cascade.
(28) Subsequent to denying Boise Cascade's plan to log the Walker Creek Unit, the State of Oregon has advertised for sale commercial timber on land that it owns in Clatsop County approximately one and a half miles from the Walker Creek Unit. The timber, which is to be clear cut, consists mostly of hardwoods that are not suitable owl habitat. (29) Adult spotted owls may live

in a habitat that encompasses an area that has a radius of more than one and a half miles.

Conclusion and Reasons: The written plan was properly denied under the Forest Practices Rules. The plan fails to comply with the requirements of OAR 629-24-809.

OAR 629-24-809 provides as follows:

> (1) Whenever the State Forester determines that an operation will conflict with protection of a nesting site of the northern spotted owl . . . , the operator must obtain the State Forester's approval of a written plan before commencing the operation. The written plan, at a minimum, must address how the operation will be conducted to provide for the following:
>
> > (a) A 70-acre area of suitable spotted owl habitat encompassing the nest site, to be maintained as suitable spotted owl habitat;
> >
> > (b) Prevention of disturbances resulting from operation activities which cause owls to flush from the nesting site. Such disturbances must be prevented during the critical period of use for nesting. The critical period of use is the time period between March 1 and September 30, each year.
>
> (2) For the purposes of this rule, nesting site means and includes the tree, when known, containing a spotted owl nest; or when not specifically known, includes an activity center of a pair of adult spotted owls. An activity center is a location determined by the State Forester to

have been reliably identified as being occupied by an adult pair of spotted owls, capable of breeding. Such determination must be supported by repeated observation of the owls in close proximity or observation of nesting behavior.

(3) (a) For the purposes of this rule, suitable spotted owl habitat means and includes:

(A) A stand of trees with moderate to high canopy closure (60 to 80 percent); multi-layered, multi-species canopy dominated by large overstory trees (greater than 30 inches in diameter at breast height); a high incidence of large trees with various deformities (e.g., large cavities, broken tops, and other evidence of decadence); numerous large snags; large accumulations of fallen trees and other woody debris on the ground; and sufficient open space below the canopy for owls to fly; or

(B) In the absence of habitat which exhibits all the characteristics listed above, the available forested habitat which comes closest to approximating the listed conditions.

(b) Stands which do not exhibit at least two of the characteristics listed in paragraph (a)(A) in this section are not suitable habitat.

(4) (For information only) Federal law prohibits a person from taking northern spotted owls. Taking under the federal law may include significant

> alteration of owl habitat on any class of land ownership. Compliance with subsection (1) of this rule is not in lieu of any federal requirements related to the federal Endangered Species Act.
>
> (5) Exceptions to the requirements for protecting northern spotted owl nesting sites may be approved by the State Forester if the operator has obtained an incidental take permit from federal authorities under the federal Endangered Species Act.

OAR 629-24-695 states that the goal of resource site protection is "to ensure that forest practices do not lead to resource site destruction, abandonment or reduced productivity." For spotted owls, the resource site is the nesting site. (OAR 629-24-800).

Boise Cascade's written plan was rejected because it did not identify for protection a 70 acre area of suitable spotted owl habitat encompassing the nest site. The plan did not specifically identify any suitable spotted owl habitat, as defined in OAR 629-24-809(3); it simply stated that there was more than 70 acres of state-owned "commercial timberland immediately adjacent to the harvest area" which could provide habitat for the spotted owls after the Boise Cascade land had been logged. The nest site located on Boise Cascade's land was necessarily excluded from that habitat. At hearing Boise Cascade did not attempt to present evidence that it intended in the written plan to protect the nest site; in fact it acknowledged its intention in the planned operation to destroy the nest tree after the critical nesting period. Under the rule, the written plan could not be approved as submitted.

<u>The Board of Forestry did not exceed its authority in adopting OAR 629-24-809</u>.

In ORS 527.630 the legislature stated the policy of the Forest Practices Act as follows:

> (1) Forests make a vital contribution to Oregon by providing jobs, products, tax base and other social and economic benefits, by helping to maintain forest tree species, soil, air and water resources and by providing a habitat for wildlife and acquatic life. Therefore, it is declared to be the public policy of the State of Oregon to encourage economically efficient forest practices that assure the continuous growing and harvest of forest tree species and the maintenance of forestland for such purposes as the leading use on privately owned land, consistent with sound management of soil, air, water, fish and wildlife resources and scenic resources within visually sensitive corridors as provided in ORS 527.755 that assures the continuous benefits of those resources for future generations of Oregonians.

In ORS 527.710 the legislature mandated that the Board of Forestry adopt administrative rules to carry out the purposes of the Forest Practices Act, to assure the continuous growing and harvesting of forest tree species and, consistent with ORS 527.630, to provide for the overall maintenance of air quality, water resources, soil productivity and fish and wildlife.

In addition to those specified rulemaking duties, the statute required the Board to collect and analyze the best available information and establish inventories of resource sites needing protection, including threatened and endangered species identified on lists that are adopted, by rule, by the State Fish and Wildlife Commission or are federally listed under the federal Endangered Species Act. Recognizing the potential conflicts between forest practices and resource sites, the Board was required to analyze such conflicts and adopt rules appropriate to protect such resource sites. The statute further required the Board to consult with other state agencies having functions with respect to the purposes specified in ORS 527.630 and to accommodate their rules and

programs to the extent deemed by the Board to be appropriate and consistent with the purposes of ORS 527.630.

The Board's authority to enact OAR 629-24-809 is clear under the above statutes. Boise Cascade's argument that rules enacted under these statutes are invalid if they prevent or impede the growing or harvesting of any trees at any time on private lands is simply not rational. The statute explicitly recognizes inevitable conflict between forest practices, which include by statutory definition the harvesting of forest tree species, and resource site protection. The Board was required to adopt rules for resource site protection.

Neither does the rule exceed in scope the authority delegated to the Board of Forestry. The identified resource sites would not be protected from destruction, abandonment or reduced productivity if the site were maintained only during the period of critical use. The site is protected so that it might shelter and promote the continued existence of the threatened species; it is not, as Boise Cascade would have it, that a particular specimen of a threatened species is protected so that it can create a new resource site. The ODF's interpretation of its statutory mandate is consistent with the plain language of that mandate. The interpretation proposed by Boise Cascade is contrary to that plain language.

The evidence also establishes that in adopting OAR 629-24-809 the Board used what it believed to be the best scientific evidence available. Nothing in the statutory mandate excluded from consideration information gathered for purposes of enforcing the federal Endangered Species Act.

Finally, there is nothing substantial in the record to support Boise Cascade's arguments that the Board of Forestry improperly delegated authority to the USFWS; that the Board shifted enforcement of the state's endangered species protection laws to the federal government; or that the Board shifted the burden of northern spotted owl protection from state lands to private lands.

OAR 629-24-809 is not invalid under the Oregon and United States constitutions. Both Article I, Section 18, of the Oregon Constitution and the Fifth and Fourteenth Amendments to the U.S. Constitution prohibit the state from taking private land for a public use without just compensation to the landowner. Boise Cascade argues that the referenced rule is invalid under those constitutional provisions and cites as authority the recent U.S. Supreme Court decision, Lucas v. South Carolina Coastal Commission, 505 US ___,112 S Ct 2886, 120 L Ed 2d 798 (1992).

Boise Cascade appears to have been undecided as to the appropriate time to advance this argument. Although it asserts in its Reply Memorandum that such an argument is not premature, it did not at hearing attempt to present evidence that any "taking" had in fact occurred. It was established that spotted owls had been observed on the property prior, to its purchase by Boise Cascade and that the ODFW had declared the spotted owl to be a threatened species in the year of purchase. There was also evidence that the 64 subject acres were part of a much larger tract of forestland, some of it contiguous to the Walker Creek Unit, and that Boise Cascade harvested timber from some of that acreage before late 1991 , when it sold off all its Clatsop County lands except the subject unit. The value of the harvested timber and the consideration received in the sale of adjoining acreage to Hampton were not established and Boise Cascade objected to any questions directed to establishing such facts. Boise Cascade's reasonable commercial expectations might well have been realized or surpassed. Certainly there is an inadequate factual basis upon which to advance any claim of a constitutional taking.

FINAL ORDER

Approval of the amended written plan submitted by Boise Cascade for its proposed Walker Creek Unit timber harvest operation,

Notification Number 92-521-11022, was properly denied under the Oregon Forest Practices Act and OAR 629-24-101 et seq.

/s/ James E. Brown

JAMES E . BROWN
STATE FORESTER and
SECRETARY to the BOARD OF
FORESTRY

Dated this 15th day of January, 1993.

You are entitled to judicial review of the Final Order. Judicial review is by the Oregon Court of Appeals pursuant to the Provisions of ORS 183.482. Judicial review may be obtained by filing a petition for review with the Office of State Court Administrator, Supreme Court Building, Salem, Oregon, 97310, within 60 days from a service of the Final Order.

Oregon
DEPARTMENT OF
FORESTRY

STATE FORESTER'S
OFFICE

"STEWARDSHIP IN
FORESTRY"

October 15, 1997

Mike Hicks
Boise Cascade Corporation
450 Pacific Avenue
Monmouth, Oregon 97361

Dear Mike:

Through routine surveying and tracking of northern spotted owls conducted by the Department of Forestry's Lands Management Program, it has recently been determined that the parcel of forestland retained by Boise Cascade Corp. (when it sold off other holdings to Agency Creek in 1991)on Walker Creek, located at SW 1/4 Section 6, T6N, R6W, in Clatsop County, no longer fits the criteria for being designated as a northern spotted owl nesting site as used in OAR 629-665-210 (formerly OAR 629-24-809).

For the purposes of this rule, nesting site means the tree, when known, that contains the nest, or when not known, the activity center, of a pair of adult spotted owls. Of the pair that previously occupied the Walker Creek site, the female was found dead last winter, and the male was recently observed at the Buster Quarry site more than eight miles away. No responses to surveying were registered this past season at the Walker Creek site.

In 1992, Boise Cascade filed notifications and written plans with the department for harvesting at this site. The written plan for a portion of the tract was denied because it did not adequately address the protection of a 70 acre area of suitable habitat around the nesting site. With the information that we have now regarding the site, if a notification were filed for harvest on this area, there would be no requirement for a written plan under the Forest Practices Act based on the existence of a northern spotted owl nesting site. Of course, any other requirements for written plans, such as operating within 100 feet of a fish-bearing stream, would still apply.

Although this parcel no longer qualifies as a northern spotted owl nesting site under the Oregon Forest Practices Act, I do not know how it will be regarded by the U.S. Fish and Wildlife Service under the Endangered Species Act. Federal law prohibits a person from taking northern spotted owls. Taking under the federal law may include significant alteration of owl habitat on any class of land ownership. You may wish to consult with Fish and Wildlife Service officials before deciding any further course of action at the Walker Creek location. The Department of Forestry will be informing the U.S. Fish and Wildlife Service of our determination by copy of this letter.

Sincerely,

/s/ Charlie Stone
Charlie Stone
Forest Practices Director

CHS:na
cc: Members of the Oregon Board of Forestry
James E. Brown, State Forester
Russell Peterson, Regional Director, USFWS
Paula Burgess, Governor's National Resources Assistant
William Cloran, Asst. Attorney General
Phillip D. Chadsey, Stoel Rives, LLP

FILED
CLATSOP CIRCUIT COURT
97 DEC 24 PM 1:37
TRIAL COURT ADMINISTRATOR

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF CLATSOP

BOISE CASCADE CORPORATION, a Delaware corporation,	)	
Plaintiff,	)	No. 93-2018
v.	)	MONEY JUDGMENT
STATE OF OREGON, by and through THE OREGON STATE BOARD OF FORESTRY,	)	
Defendant.	)	

The claims presented in this case have been fully and finally adjudicated as follows:

Plaintiff's First Claim for Relief for Inverse Condemnation under the Oregon Constitution was voluntarily dismissed on plaintiff's own motion.

On Plaintiff's Second Claim for Relief - Count Two (Lucas Per Se Claim - U.S. Constitution), the court ordered that summary judgment be entered in favor of plaintiff.

On Defendant's Alternative Counterclaim (Declaratory Judgment) the court declares that the taking was temporary and defendant did not acquire a fee interest in plaintiff's property.

Finally, Plaintiff's Second Claim for Relief - Count One (Loretto Per Se Claim - U.S. Constitution) was submitted to the jury which found in favor of plaintiff and against defendant.

Based on the jury's special interrogatory verdict in this action, dated November 21, 1997, plaintiff's damages in this action are as follows:

1.	January 15, 1993 Fair Market Value	$2,279,233
2.	Interest at the statutory legal rate of 9 percent per annum from the date of the taking, January 15, 1993, to the date the taking was lifted, October 17, 1997 (as determined by the court)	$1,156,251
3.	Sum of 1 and 2	$3,435,484
4.	October 17, 1997 Fair Market Value	$1,615,425
5.	Just Compensation for Temporary Taking of Plaintiff's Timber for period from January 15, 1993 to October 17, 1997 (3 minus 4)	$1,820,059

THEREFORE, IT IS ORDERED AND ADJUDGED that plaintiff shall have judgment against defendant as stated below.

MONEY JUDGMENT

A.	Judgment Creditor:	Boise Cascade Corporation
B.	Judgment Creditor's Attorney:	Phillip D. Chadsey, OSB No. 66028
C.	Judgment Debtor:	State of Oregon
D.	The amount of the judgment:	$1,820,059.00
E.	Pre-judgment Interest:	None
F.	The judgment creditor is owed interest on $1,820,059.00 at the rate of 9 percent per annum from October 17, 1997.	
G.	Costs:	Costs shall be determined following entry of judgment pursuant to ORCP 68 C.

DATED this 24 day of December, 1997.

/s/ Paula Brownhill
Paula J. Brownhill

Circuit Court Judge

SUBMITTED BY:
Phillip D. Chadsey, OSB No. 66028
Of Attorneys for Plaintiff

DEPARTMENT OF JUSTICE
GENERAL COUNSEL DIVISION
Justice Building
Salem, Oregon 97310
Telephone: (503) 378-6986
FAX: (503) 378-3784

June 16, 1992

Dale Hall
U.S. Fish and Wildlife Service
911 Northeast 11th
Portland, OR 97232

Re: Boise Cascade Operation Plan in Clatsop County
DOJ File No. 629-430-NR0092-92

Dear Mr. Hall:

This office represents the Oregon Department of Forestry (ODF). We have received a copy of the letter to you dated May 27, 1992, from Phil Chadsey, representing Boise Cascade Corporation (Boise). Although we do not intend to ask you to referee a debate on the Endangered Species Act or the Oregon Forest Practices Act, some clarification of ODF's position and intention is necessary, because Mr. Chadsey's letter substantially misstates them. He implies that ODF is acting under authority of the federal Endangered Species Act; in fact, ODF is simply enforcing state law -- specifically, its Forest Practices rules.

ODF has not "established as a condition of logging the site that Boise Cascade obtain an incidental take permit from your agency." Rather, because Boise's written operation plan failed to meet the state's regulatory requirements for protecting spotted

owl habitat, ODF referred Boise to an administrative rule that authorizes the State Forester to grant an exception to the state's habitat protection rules if the appropriate federal agency has issued an incidental take permit. (Presumably, the rule reflects a policy of giving careful consideration to another government agency's decision that an operator has taken adequate alternative steps to protect habitat.) Without implying agreement with Mr. Chadsey's interpretation of the Endangered Species Act or any disinterest in USFWS's interpretation of the Act and implementing rules, interpretation of federal law is simply not an issue under the Oregon Forest Practices Rules.

The purpose of referring Boise to the alternative standard for protecting spotted owl habitat is not to shift responsibility to the federal government for the inverse condemnation claim that Boise has threatened to file. Instead, as I explained in the previous paragraph, we consider ODF's decision in this matter to be governed by Oregon law. Your agency's action is significant only to the extent that, if you grant an incidental take permit, the State Forester is then authorized to grant an exception to ODF's habitat protection rules. A decision that no incidental take permit is required under federal law would not meet the requirements of the Oregon administrative rule.

I hope this clarifies the state's position. If you have any questions, please do not hesitate to call.

Sincerely,

/s/ Jerome Lidz

Jerome Lidz
Assistant Attorney General
Natural Resources Section

JSL:tmt/JGG037FA

c: The Honorable Thomas L. Sansonetti
Office of the Solicitor
U.S. Department of the Interior
1849 C Street, N.W.
Washington, DC 20240
Phillip D. Chadsey
Stoel Rives Boley et al
900 SW Fifth Avenue, Ste. 2300
Portland, OR 97204-1268

IN THE COURT OF APPEAL
OF THE STATE OF OREGON

BOISE CASCADE CORPORATION, a Delaware corporation,	)	Clatsop County Circuit Court No. 93-2018
Plaintiff-Respondent,	)	CA A100855
v.	)	**ORDER GRANTING MOTION TO TAKE JUDICIAL NOTICE AND DENYING PETITION FOR RECONSIDERATION**
STATE OF OREGON, by and through the Oregon State Board of Forestry,	)	
Defendant-Appellant.	)	

Respondent has moved for the court to take judicial notice of the following documents pursuant to OEC 201(b) and (d): (1) Complaint for Declaratory Relief, filed in July 1993, in *State of Oregon v. International Paper Co.*, Civil No. 93-623-HO, U.S. District Court for the District of Oregon; (2) Order of the U.S. District Court for the District of Oregon, filed July 27, 1998, in *United States v. West Coast Forest Resources*, Civil No. 96-1575-HO; (3) Opinion and Order of the U.S. District Court for the District of Oregon, filed April 1, 1998, in *Boise Cascade Corporation v. Spear*, Civil No. 97-1810-JO; (4) Decree and Judgment, filed and entered October 15, 1998, enjoining respondent from further timber logging on its Walker Creek Unit without an incidental take permit; (5) Complaint in mandamus, filed December 10, 1998, against the Oregon state supervisor of USF&WS in *Boise Cascade Corporation v. Peterson*, Civil No. 98-1538; (6) Transcript of proceedings in *Peterson* mandamus action, February 5, 1999; (7) Letter from Samuel D. Rauch, III, to Phillip D. Chadsey, dated July 30, 1999, and (8) Letter from USF&WS to Mr. Chadsey, dated July 30, 1999. The motion to

take judicial notice is denied as to items (7) and (8); the motion is granted as to all other documents.

Respondent has petitioned for reconsideration of the court's opinion issued on November 10, 1999. The petition is denied.

JAN 6 2000
Date

/s/ Paul J. De Muniz
PAUL J. DEMUNIZ,
Presiding Judge

c: Phillip L. Chadsey
David F. Coursen
Daniel H. Kearns
John M. Groen

REPLIES SHOULD BE DIRECTED TO THE STATE COURT ADMINISTRATOR, RECORDS SECTION, SUPREME COURT BUILDING, 1163 STATE STREET, SALEM, OR 97310

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FILED
1997 JUL 28 AM 8:04
UNITED STATES DISTRICT COURT
DISTRICT OF OREGON
EUGENE, OREGON
By /s/ unreadable

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

UNITED STATES OF AMERICA,	)
	)
Plaintiff,	) Civil No. 96-1575-HO
	)
v.	) ORDER
	)
WEST COAST FOREST RESOURCES LIMITED PARTNERSHIP and DEANS MT. LOGGING CO.,	)
	)
Defendants.	)
	)

The United States brought this suit to permanently enjoin the clearcut harvest of ninety-four acres of privately owned forest land in Lane County, Oregon, known as the Good Hominy Unit ("the Unit"). On July 28, 1997, this court denied the motion for permanent injunction and instead issued a temporary injunction for one year, in order to maintain the status quo until further research could be completed. The court ordered plaintiff to commence radiotelemetry monitoring of a pair of owls known as the "Chickahominy Pair" ("the owls," or "the pair"). Now before the court is plaintiff's motion for permanent injunction (#109). The court heard oral arguments and the presentation of evidence on November 9, and 10, 1999.

I. Summary of Evidence Presented

A. Testimony of Dr. Forsman

The United States presented the testimony of Dr. Eric Forsman, a Research Wildlife Biologist employed by the United States Forest Service, Pacific Northwest Research Lab in Corvallis, Oregon. Dr. Forsman opined that, although he cannot predict with absolute certainty whether harvesting the Unit would cause the owls to leave the site, it is reasonably certain that harvesting the Unit is likely to "significantly impact" the reproductive rates of the pair and its ability to survive on the current site. Dr. Forsman opined that harvesting the Unit will harm the pair by reducing the prey supply and causing an inability to roost in the Unit. He explained the chain of events that could lead to the owls' death: (1) clearcut; (2) prey in the area becomes no longer available; (3) reduction in prey forces owls to forage elsewhere; (4) the owls must expend more energy to find food; and (5) the owls could potentially starve to death, produce fewer young because of less food, or even be predated due to risky travel to other sources of food.

He acknowledged that if there was still enough habitat and prey after harvesting, there would be no significant effect on the owls. Dr. Forsman used a 75% Adaptive Kernal ("AK") method in determining the "core area." He found that the Unit was within the 75% AK for the male, but not for the female. He opined that 14% of the landscape inside the home range consists of older forests, and that 21% of the sightings from the study were in the older forests. He opined that 56% of the landscape is pole young and broad leaf, and that 60% of the sightings were in this tree type. He concluded that the older forests were used more than expected based on their availability. Based on prior research of other areas, Dr. Forsman opined that owls with 20% or less of old forest produced far fewer young than those with 60% or more.

Dr. Forsman's definition of "suitable habitat" included areas where owls are able to replace themselves. Dr. Forsman acknowledged that the telemetry study revealed that pole young and broadleaf were used for roosting and foraging by the owls, but opined that other studies of other sites indicates that pole young and broadleaf are not suitable habitat.

Dr. Forsman acknowledged the pair's recent high reproductive rate of .86, and that the increase occurred despite previous clearcuts in the area, but opined the high reproductive rate is not indicative of survivability because it is within a relatively short period of time.

B. Testimony of Dr. Ramsey

The government presented the testimony of Fred L. Ramsey, Ph.D., a professor of statistics at Oregon State University. Dr. Ramsey testified as to the relevancy of defendant's decision to change the boundaries of the proposed harvest. Following the telemetry study, defendant changed the boundaries to avoid areas containing numerous telemetry points. Dr. Ramsey opined that changing the Unit's boundary has no statistical validity. He further testified that without knowing habitat differences, no inference can be drawn from the fact that one area contains seven telemetry points, and another contains only one. Dr. Ramsey explained that the models created from the telemetry study are descriptive, not predictive, and that if there is no difference in habitat, then one could assume the points would be dispersed differently next time. Dr. Ramsey acknowledged that there may be a missing variable.

C. Testimony of Dr. Rosenberg

The government presented the testimony of Daniel K. Rosenberg, Ph.D., an assistant professor of wildlife ecology in the Department of Fisheries and Wildlife at Oregon State

University. Dr. Rosenberg opined that it is reasonably certain that harvesting the Unit will significantly impact the reproduction and survival of the owls, and may lead to site abandonment. He explained that old forest is sparse in the Oregon Coast Range, the Unit includes old forest, and the telemetry study indicated a strong selection for older forests over pole young. Dr. Rosenberg noted that the Unit is highly associated with owl usage; it was clearly selected for foraging, particularly by the male owl. He acknowledged that the owls use pole young and broad leaf trees, but "not necessarily proportionate to their availability." He opined that pole young and broad leaf are not suitable habitat.

Dr. Rosenberg, in referring to the telemetry study, stated that the owls were almost three times more likely to select a stand within the Unit, rather than outside the Unit. He opined, "There's something about the Unit [that they prefer]." He stated that there could be other unknown variables present making the Unit "special."

He agreed with Dr. Ramsey that there is no reason to believe a revision of the Unit would be consequential, but that there may be an unidentified variable not accounted for. He further noted that the owls' main source of prey is the flying squirrel, and that accessibility to, rather than abundance of, prey is most important. He opined that there is no significant difference in the abundance of flying squirrels in old or new forests.

Dr. Rosenberg stated that a threshold of 30% of old forest must be met for survival of owls. He asserted that he did not find it surprising, but rather, encouraging, that despite the relatively low percentage of old forest currently in the area, the owls have recently experienced a higher than average reproductive rate. In addition, in acknowledging that other nearby pairs whose habitats include higher percentages of old

forests have experienced lower reproductive rates than the pair in the past three years, Dr. Rosenberg explained that reproductive rates are variable, and could be the product of other effects.

Dr. Rosenberg reasoned that his conclusion as to a detrimental effect on the owls can be made with reasonable certainty because: (1) the Unit is within the owls' home range; (2) the Unit is likely within the owls' core area; (3) the Unit contains portions of preferred old forest; (4) preferred old forests are already very limited in the owls' home range; (5) the owls are selecting the Unit; and (6) studies of other owls indicate that owls in areas with less than 30% older forest perform poorly.

Dr. Rosenberg stated that the telemetry study was descriptive in that it provided the parties with information as to the owls' home range and provided data that is consistent with general knowledge of owl behavior. He stated that using the data from the study, and combining that data with information known regarding the type of habitat and elevation suitable for owls allows researchers to predict future usage.

D. Testimony of Dr. McDonald

Defendant presented the testimony of Trent L. McDonald, Ph.D., a biomatrician employed by Western Ecosystems Technology, Inc., in Cheyenne, Wyoming. Dr. McDonald opined that the following factors are relevant variables in owl habitat selection: elevation, distanced to water, distance from the nest, and vegetation type. Dr. McDonald utilized these factors in creating "resource selection function" models, and concluded that, when all the factors that influence owl use are

integrated together, the area within the Unit is not significant to the owls.[1]

E. Testimony of Dr. Irwin

Defendant presented the testimony of Larry L. Irwin, the Wildlife Program Manager employed by the National Council for Air and Stream Improvement. Dr. Irwin noted that relevant factors include elevation, distance to the nest site, and vegetation types. Dr. Irwin opined that harvesting the Unit will not affect the owls' essential life functions. He reasoned that: (1) there is sufficient suitable habitat even without the Unit; (2) these particular owls have had a relatively high reproductive rate; (3) the Unit is far from the nest site, and therefore, the likelihood of future use is low due to distance and elevation factors; and (4) the only recorded use of the Unit was by the male for foraging, and he will forage elsewhere if the Unit is not available.

Dr. Irwin opined that the threshold amount for suitable habitat for owl survival is 20%. He further noted that the owls are selecting pole young and broad leaf, and thus, these vegetation types must be included as suitable habitat. Based on this premise, he opined that there is over 70% suitable habitat available in the home range, and harvesting the Unit will remove only approximately 5% of the total suitable habitat. He further noted that from 1991 through 1998, the reproductive rate of the owl pair was .86 per year, as compared to other owls in the coast range which average .65 - .70 per year. Dr. Irwin acknowledged that the Unit has some suitable habitat, but opined that if the Unit was unavailable other resources would still be available. He

[1] The court notes that defendants' experts generally referred to the new Unit boundaries, whereas plaintiffs' experts generally referred to the old Unit boundaries. The court's conclusion is the same regardless of which boundaries are considered.

concluded that clearcutting the Unit would affect the owls' foraging "very minimally."

F. Testimony of Mr. Carson

Defendant presented the testimony of Robert G. Carson, a wildlife biologist for Mason Bruce & Girard, who performs "take" evaluations. He opined that pole young and broad leaf trees are suitable habitat. He reasoned that, according to the telemetry study, pole young trees were used 32% of the time, and broad leaf trees were used 24% of the time. He noted that old forest was used 21% of the time. He opined that the total amount of suitable habitat in the owls' home range is 64%.

He further reasoned that if the owls truly had available only 20% suitable habitat, then the expected reproductive rate would be .4, but that it is much higher. In referring to his table indicating the reproductivity of the owl pair as compared to other pairs in the coast range, the pair ranked 24th out of 133 pairs in high reproductive rates. He concluded that harvesting the Unit would not affect foraging and roosting behavior of the owls.

Mr. Carson acknowledged his previous opinion in September 1996 that broad leaf was not considered suitable, but explained that this previous opinion was based on a vegetation-based definition, but now that the telemetry study has been completed, a use-based definition of suitable habitat is more appropriate. This use-based definition indicates that broadleaf is suitable habitat. Whereas in 1996 he opined that there was 26% suitable habitat in the owls' home range, now, based on the use-based definition of suitable habitat which indicates that broad leaf should be included, he concluded that there is 65-70% suitable habitat in the owls' home range.

II. Findings of Fact

The court reaches the following findings of fact based on the evidence presented in both the initial and subsequent hearings. The court does not repeat findings already stated in this court's July 28, 1997, order. Unless otherwise indicated due to these findings being made with the benefit of further studies following this court's prior order, this court's prior findings are incorporated herein.

The Unit is within the home range of the owl pair. The 95% Adaptive Kernal home range for the pair is approximately 3602 acres. The size and shape varies from year to year regardless of whether the Unit is cut.

The pair is actually using the Unit, primarily for foraging by the male owl.

The telemetry study revealed that the owls used older forests in a higher percentage than their availability. Pole young and broad leaf were also used heavily by the owls for foraging and constitute "suitable habitat" for these owls.[2]

When including pole young and broad leaf as suitable habitat for this owl pair, there is 60-70% suitable habitat located within the pair's actual home range.

The reproductive rate of these owls from 1991 through 1998 was .86 young per year, as compared to other owls in the coast range which average .65 - .7 per year.

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[2] The court states no opinion as to whether pole young and broad leaf may constitute "suitable habitat" in other circumstances. Rather, the court must consider all circumstances of each individual case to determine what is suitable habitat.

III. Standard for Issuance of Permanent Injunction

Under section 9 of the Endangered Species Act ("ESA"), it is unlawful for any person to "take" an endangered or threatened species. 16 U.S.C. § 1538(a)(1). The court previously concluded that the northern spotted owl is a threatened species, and a primary reason for the bird's decline is the loss of suitable habitat. See Order dated July 28, 1997. "Take" includes actions that "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." Id. § 1532(19). The Secretary of the Interior has further defined "harm" as follows:

> "Harm" in the definition of "take" in the Act means an act which actually kills or injures wildlife. Such act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering.

50 C.F.R. § 17.3.

The burden is on the government to establish to a reasonable certainty that the proposed harvest will result in significant habitat modification that actually kills or injures the owls by significantly impairing the owls' essential behavioral patterns, including breeding, feeding, or sheltering. See 50 C.F.R. § 17.3

To establish "harm" from habitat modification, plaintiff must show "significant impairment of the species' breeding or feeding habits and prove that the habitat degradation prevents, or possibly, retards, recovery of species." National Wildlife Federation v. Burlington Northern Railroad, Inc., 23 F.3d 1508, 1512-13 (9th Cir. 1994).

The harm that is imminent must be the death or actual injury of an identifiable species. "Mere speculation" is not sufficient; there must be "a definite threat of future harm to [a] protected species." Burlington, 23 F.3d at 1512 n.8.

Both parties agree that harvesting the Unit will at least affect the male owl's foraging in light of the evidence that the male owl has used the Unit for foraging on various occasions. Defendants correctly note, however, that this interference, alone, is not enough to satisfy the ESA. Rather, plaintiff must also prove by a preponderance of the evidence that this interference will "actually kill[] or injure[]" the owls. 50 C.F.R. § 17.3.

IV. Conclusions of Law

Plaintiff has failed to satisfy its burden of establishing to a reasonable certainty that harvesting the Unit will result in significant habitat modification that would actually kill or injure the owls by significantly impairing the owls' essential behavioral patterns, including breeding, feeding, or sheltering. The telemetry study indicates that this owl pair uses pole young and broad leaf trees for foraging throughout the home range. Although the study indicates that the pair used, and possibly even selected, old forest for foraging, plaintiff has failed to establish that the old forest in the Unit is essential to the owl's survival. The court is not persuaded that removing the Unit as a source of foraging will actually kill or injure the owls.

Unlike in Marbled Murrelet v. Babbitt, 83 F.3d 1060 (9th Cir. 1996), wherein the Ninth Circuit held that harvesting the proposed area "would likely harm marbled murrelets by impairing their breeding and increasing the likelihood of attack by predators on the adult murrelets as well as the young," id. at 1067-68, here, the evidence indicating that the owls also heavily used other old and young timber areas, outside the Unit, for foraging and other activities, and that the owls maintain relatively

high reproductive rates, is persuasive that harvesting the Unit will not harm the owl pair.

V. Conclusion

For the foregoing reasons, plaintiff's motion for permanent injunction [#109] is denied.

IT IS SO ORDERED.

DATED this 10th day of March, 2000.

/s/ Michael R. Hogan
United States District Judge

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Attorneys for: Plaintiff

IN THE FEDERAL DISTRICT COURT

FOR THE DISTRICT OF OREGON

STATE OF OREGON, acting by and through the Oregon Department of Forestry,	)	
Plaintiff,	)	Civil No. 93-6223-HO
v.	)	COMPLAINT FOR DECLARATORY RELIEF
INTERNATIONAL PAPER CO., a foreign corporation; FOREST CONSERVATION COUNCIL, a domestic nonprofit corporation; and THE DIRECTOR, UNITED STATES FISH AND WILDLIFE SERVICE, UNITED STATES DEPARTMENT	)	

OF THE INTERIOR,)
)
Defendant.)

I. INTRODUCTION

This is a suit for declaratory relief. Plaintiff seeks a declaration of its legal rights and responsibilities under the Endangered Species Act, 16 U.S.C. § 1531 to 1544. In particular, plaintiff seeks a declaration regarding the respective rights and responsibilities of the parties with respect to a timber sale under state timber sale contract No. 341-90-04, known as Roberts Creek No. 6, located in the Elliott State Forest, Coos County, Oregon.

II. JURISDICTION

This court has jurisdiction pursuant to 28 U.S.C. § 1331 and 28 U.S.C. § 1346. This action arises under the Endangered Species Act. 16 U.S.C. § 1531 to 1544, and the Declaratory Judgment Act, 28 U.S.C. § 2201.

III. PARTIES

The Oregon Department of Forestry is a duly constituted agency of the State of Oregon, having responsibility for the sale of certain timber on state lands, as well as the general management of timber.

IV.

Defendant International Paper Company is a foreign corporation having its principal place of business in the State of New York.

V.

Defendant Forest Conservation Council is a nonprofit Oregon corporation having its principal place of business in Portland, Oregon, and a branch office in Eugene, Oregon.

VI.

The United States Fish and Wildlife Service is a duly constituted agency of the United States Government and its Department of Interior having responsibility for the enforcement and implementation of the Endangered Species Act. Defendant Director of the United States Fish and Wildlife Service has responsibility for the actions of the employees of the Fish and Wildlife Service in carrying out its responsibilities with regard to the Endangered Species Act.

First Cause of Action

VII.

On or about March 23, 1990, the Oregon Department of Forestry entered into a timber sale contract with International Paper Company, being timber sale contract 341-90-04, and popularly known as the Roberts Creek No. 6 timber sale. The timber sold is located on the Elliott State Forest in Coos County, Oregon. Proceeds from the sale of the timber on this sale are dedicated to the "Common School Fund" and are to support the education of children in public schools from kindergarten through high school. A copy of the timber sale contract is attached hereto as Exhibit 1 and incorporated by reference herein.

VIII.

On or about June 12, 1991, a pair of Northern Spotted Owls was discovered in or near the timber sale area. The Oregon Department of Forestry was formally notified of the existence of this owl pair in September, 1991, and, after

conferring with the Oregon Department of Fish and Wildlife, notified defendant International Paper Company of the presence of this spotted owl pair on November 8, 1991.

IX.

The Northern Spotted Owl was listed as a "threatened" species under the provisions of the Endangered Species Act on July 23, 1990. Thereafter, the United States Fish and Wildlife Service issued guidelines for timber harvesting to avoid an "incidental take" of the Northern Spotted Owl. The term "take" is defined in the Endangered Species Act, 16 U.S.C. § 1532(19). An "incidental take" is a "take" incidental to the conducting of an otherwise lawful activity. Thereafter, in August, 1992, the United States Fish and Wildlife Service rescinded those guidelines. See Exhibit 2, attached hereto and incorporated by reference herein. However, even after the guidelines were rescinded, the United States Fish and Wildlife Service represented to the plaintiff and others that the rescinded guidelines represented the best biological information available to avoid an "incidental take" under the Endangered Species Act, and further informed the plaintiff that enforcement action could be taken against plaintiff and its employees, officers, and agents in the event of activity on state lands which could constitute a "take."

X.

Under the terms of the Endangered Species Act, it is unlawful for any person, including any state, or any officer, employee, agent, department or instrumentality of any state, to "take" any endangered species. It is the policy of the State of Oregon and in particular, of this plaintiff, that the State of Oregon and its agencies will comply with the law, including the Endangered Species Act.

XI.

No owls were discovered in the vicinity of the Roberts Creek No. 6 timber sale in 1992. As yet, no owls have been discovered in that area during 1993.

XII.

The Marbled Murrelet was listed as a "threatened" species under the Endangered Species Act on October 1, 1992. In late 1992, plaintiff was informed of occupied behavior by at least one Marbled Murrelet in the near vicinity of the Roberts Creek No. 6 timber sale. No guidelines have been issued by the United States Fish and Wildlife Service to determine what activity or activities would constitute a "take" of the Marbled Murrelet under the Endangered Species Act, although plaintiff has repeatedly requested guidance from the United States Fish and Wildlife Service.

XIII.

Under the rescinded guidelines issued by the United Fish and Wildlife Service, as well as the protocols issued by the Service for owl surveying, it appears that allowing a harvest of the timber contained in the Roberts Creek No. 6 timber sale would result in a "take" of the Northern Spotted Owl. In addition, plaintiff fears that allowing timber harvest would result in a "take" of one or more members of the Marbled Murrelet species. It is both the policy and the desire of the plaintiff to avoid any unlawful "take" of any threatened or endangered species under the Endangered Species Act. It is the duty of plaintiff to carry out its contracts and to generate revenues from this sale for the Common School Fund.

XIV.

Defendant International Paper Company has given notice to the Oregon Department of Forestry of its intent to file suit for breach of the timber sale contract if it is not allowed to go forward and harvest timber on the Roberts Creek No. 6 timber sale. See Exhibit 3, attached hereto and incorporated by reference herein.

XV.

Defendant Forest Conservation Council has similarly given notice of its intent to sue plaintiff and others if plaintiff allows the timber sale to go forward. See Exhibit 4, attached hereto and incorporated by reference herein.

XVI.

Plaintiff has repeatedly sought the advice and assistance of the United States Fish and Wildlife Service regarding whether allowing a harvest of this timber sale would constitute a "take" of either the Northern Spotted Owl or the Marbled Murrelet. However, plaintiff has received no clear statements with respect to "take" and so remains uncertain of its rights and responsibilities under the Endangered Species Act.

XVII.

In addition to the other provisions of the timber sale contract at issue, defendant International Paper Company has agreed that it "shall at all times observe and comply with all federal and state laws, and lawful regulations issued thereunder and local bylaws, ordinances and regulations, which in any manner affect the activities of [International Paper Company] under this contract." Exhibit 1, at section 21. It is the position of the plaintiff that this provision requires International Paper

Company to comply with the provisions of the Endangered Species Act, and, lawful regulations pursuant to it.

XVIII.

As a result of the notice of intent to sue tendered by defendants International Paper Company and Forest Conservation Council, plaintiff is at risk of receiving inconsistent legal interpretations of its rights and responsibilities. In addition, in the event that plaintiff allows the timber sale to be harvested, plaintiff is subject to civil and criminal penalties at the hands of the United States Fish and Wildlife Service and the United States Government pursuant to the provisions of the Endangered Species Act.

XIX.

A real and substantial controversy exists between the parties hereto. This controversy can be settled only by a common adjudication in one forum. Plaintiff has no adequate remedy at law.

WHEREFORE, plaintiff prays for a declaration of the respective rights, responsibilities, and legal obligations of the parties, individually and among and between themselves, with respect to the Roberts Creek No. 6 timber sale contract No. 341-90-04.

DATED this _____ day of July, 1993.

Respectfully submitted,

THEODORE R. KULONGOSKI
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App. Y-1

United States Department of the Interior

OFFICE OF THE SOLICITOR
Pacific Northwest Region
500 N.E. Multnomah Street, Suite 607
Portland, Oregon 97232

December 10, 1997

Phillip D. Chadsey
Stoel Rives
Standard Insurance Center
900 SW Fifth Avenue, Suite 2300
Portland, Oregon 97204-1268
Fax: (503) 220-2480

RE: Walker Creek northern spotted owl site

Dear Mr. Chadsey:

On December 2, 1997, two representatives of the United States Fish and Wildlife Service ("Service") visited the Walker Creek northern spotted owl site at your client's invitation. The visit confirmed that the site contains nesting habitat as well as foraging or dispersal habitat for spotted owls.

Survey protocols peer reviewed by federal and state agencies, as well as scientists, biologists, and managers of private timber companies, recommend documenting that a site is vacant for three years before it is considered unoccupied. The removal of nesting habitat at the Walker Creek site, and the prey base associated with this high quality habitat, would create a risk of harm to the spotted owls which would use this site. The Service recommends that the site continue to be monitored consistent with the protocols if Boise wants to be sure it is unoccupied.

As indicated to you in previous correspondence, if your client desires certainty in this matter, it is welcome to pursue an HCP and an incidental take permit under the ESA. This office and the Service would be pleased to provide technical assistance in this endeavor. Another option might be to pursue a land exchange with the State of Oregon, which we believe may be the best alternative for all involved parties.

For the Regional Solicitor

/s/ Steven Siegel
Steven Siegel
Attorney
U.S. Department of the Interior

FILED

1998 OCT 15 P 12:20

CLERK, U.S. DISTRICT COURT
DISTRICT OF OREGON
PORTLAND, OREGON
BY /s/ unreadable

UNITED STATES DISTRICT COURT
DISTRICT OF OREGON

BOISE CASCADE CORPORATION,	)
	) Civil No. 97-1810-JO
	)
Plaintiff,	) **DECREE AND**
	) **JUDGMENT**
v.	)
	)
MICHAEL J. SPEAR, REGIONAL DIRECTOR FOR U.S. FISH & WILDLIFE SERVICE.	)
	)
Defendant.	)
	)

This matter came on for hearing on defendant's motion for preliminary injunctive relief before the Honorable Robert E. Jones, United States District Judge, to enjoin and restrain plaintiff from logging a tract of timber that it owns in Clatsop County, Oregon, known as the Walker Creek Unit. On April 1, 1998, this Court issued an Opinion and Order granting the preliminary injunction request and staying the case until September 4, 1998, pending surveying. The factual findings and conclusions of law set forth in that order and the attached Factual Findings and Conclusions of Law are incorporated by reference into this decree.

On September 15, 1998, this Court held a status conference to evaluate the results of the surveying. On the basis of all evidence submitted by the parties, and arguments of counsel, this Court hereby finds and concludes that defendant is entitled to a permanent injunction in this matter.

Therefore,

IT IS ORDERED AND ADJUDGED that Boise Cascade Corporation, plaintiff herein, its officers, employees and agents, and all those in active concert with them, are hereby permanently enjoined and restrained from taking any northern spotted owls by the logging of any further timber in its Walker Creek Unit without a permit issued pursuant to Section 10 of the ESA. Plaintiff's counterclaim for injunctive and declaratory relief is dismissed.

Dated Oct 15, 1998

/s/ Robert E. Jones
Honorable Robert E. Jones
U.S. District Judge

SUBMITTED BY:

/s/ Samuel D. Rauch, III
Samuel D. Rauch, III,
Of Attorneys for Defendants

U.S. Department of Justice

Environment and Natural Resources Division

SDR
90-8-6-04291

Wildlife and Marine Resource Section
P.O. Box 7369
Ben Franklin Station
Washington, D.C. 20044-7369

Telephone (202) 305-0210
Facsimile (202) 305-0275

July 30, 1999

Phillip D. Chadsey
Stoel Rives LLP
900 SW Fifth Avenue, Suite 2300
Portland, Oregon 97204-1265
Facsimile: 503-220-2480

Re: Boise Cascade Corp. v. Peterson, Civil No. 98-1538-JO (D.Or.); Boise Cascade Corp. v. Spear, Civil No. 97-1810-JO (D.Or.)

Dear Mr. Chadsey

As you are aware, the United States Fish and Wildlife Service ("FWS") has now concluded that, based upon their review of all of the information concerning the Walker Creek site over the last three years and the new survey results, the best scientific information currently available indicates that no spotted owls would be taken by Boise Cascade's planned harvest of the property. Accordingly, the FWS has determined that an incidental take permit under the Endangered Species Act is no longer required.

In light of these determinations, the federal government would support a motion filed either by Boise Cascade or filed

jointly by Boise Cascade and the federal government to lift the present injunction. Please call me if you have any questions.

Sincerely,

/s/ Samuel D. Rauch, III

Samuel D. Rauch, III
Trial Attorney
(202) 305-0220